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INDEX OF CASES.

Act of May 19, 1897,	442	Bowling, Taylor v. (C. P.)	103	Com'th v. Livingston (Q. S.)	153
Adam's Estate, (O. C.)	331	Braddock Twp., <i>In re</i> An-		Com'th v. Phillips <i>et al.</i> (Q. S.)	461
Allegheny County, Edwards		nexation of (Q. S.)	198	Cookson v. Pittsburgh &	
v.	431	Braden, The Upper Ten		Western Ry. Co.	394
Allegheny County, Fraser		Mile Plank Road Co. v.	105	Corcoran's Estate	112
v. (C. P.)	412	Bragdon v. Perkins-Camp-		Corrigan, McKinney & Co.,	
Allegheny Heating Co.,		bell Co. (C. P.)	338	Pierce v. (U. S. C. C.)	219
Claybourn <i>et al.</i> v. (C. P.)	32	Braunschweiger v. Waits	364	Cote v. Schoen	13
Allegheny Valley Ry. Co.,		Brown's Appeal	207	County of Allegheny, Ed-	
Scott v.	83	Brown's Estate (O. C.)	228	wards v. (C. P.)	109
Allegheny Heating Co.,		Bryar v. Bryar, Campbell		County of Allegheny v.	
Henderson v.	283	(U. S. C. C.)	292	Grier	427
Allison <i>et al.</i> v. Powers	408	Brymer v. The Butler Water			
Appeal, Birch and Rowland	344	Co.	285		
Appeal, Brown's	207	Buchanan v. Supreme Con-		Danley v. Danley <i>et al.</i>	437
Appeal, City of Allegheny	159	clave Improved Order of		Davidson v. Lake Shore &	
Appeal, City of Pittsb.	317, 320	Heptasophs	185	Mich. Southern Ry. Co.	386
Appeal, Frazier's	90	Burk v. Howley (C. P.)	46, 266	Dawson v. Kirby (C. P.)	234
Appeal, Hartzell's	244	Burns' Estate (O. C.)	47	Death of William D. Moore	133
Appeal, Jackson's	229			Death of Seward W. Hay-	
Appeal, Miller's	223			maker	297
Appeal, Ross'	276	Caldwell v. Snyder	213	Death of Hon. John H.	
Appeal, Sayers'	217	Callery, Johnston v.	123	Bailey	265
Appeal, School Directors of		Calhoun's Estate, (O. C.)	414	Death of Hon. Thomas	
Kittanning Twp.	279	Carnegie Steel Co., Snod-		Ewing	383
Appeal, Stevenson's	306	grass v.	37	Denniston v. The Phila. Co.	14
Application of "The Ac-		Central Presbyterian Church,		Dickson, Musgrave v.	85
countants' Ass'n of Pgh."		Gannon's Executors v.	57	Dickson v. Hartman Manu-	
for a Charter (C. P.)	103	Chaffey v. Boggs	314	facturing Company	391
Auberle v. City of McKees-	308	Chambers v. McKee (C. P.)	387	Doubt, <i>In re</i> Application of	
port		Childs <i>et al.</i> , Pittsburgh v.	255	(C. P.)	270
		Christner v. John	117	Dougherty, United Security	
		Citizens' Traction Company,		Life Ins. & Trust Co. v.	
		Thompson <i>et ux.</i> v.	405	(C. P.)	130
Bailey, v. The Huckestein		City of Allegheny v. Falck		Doherty, The Mutual Life	
Brick & Stone Co. (C. P.)	56	(C. P.)	378	Ins. Co. v. (U. S. C. C.)	65, 192
Bailey, McGowan v.	454, 456	City of Allegheny v. Fed-		Douglass Furnace Co. v. Oil	
Bair & Gazzam v. Jarboe <i>et</i>		eral St. & Pleasant Valley		Well Supply Co.	284
<i>al.</i> (C. P.)	340	Pass. Ry. Co.	243	Drum v. Millar <i>et al.</i> (C. P.)	176
Baker, Marks v.	143	City of Allegheny v. Pittsb.,		Dwelling House Ins. Co.,	
Balph, Com'th v. (Q. S.)	148	Allegheny & Manchester		Yost v.	333
Bankruptcy Law	163	Pass. Ry. Co.	241	Dwelling House Ins. Co.,	
Baum, Klinefelter <i>et al.</i> v.	58	City of Meadville, White v.	97	Sands v.	333
Bartley v. Phillips <i>et al.</i>	261	City of McKeesport, Au-		Dzik v. Bigelow (C. P.)	360
Baldwin v. Ralston (C. P.)	311	berle v.	308		
Beaver Falls Borough <i>et al.</i> ,		City of New Castle, Smith v.	215		
Metzgar v.	102	Clark's Son & Co. v. Pittsb.		Edwards v. County of Alle-	
Beilstein, Hasel v.	457	Natural Gas Co. (C. P.)	301	gheny (C. P.)	109, 431
Berlinger v. Lutz <i>et al.</i>	402	Clark & Co. v. The Sigua		Electrical Supply and Con-	
Bigelow, Dzik v. (C. P.)	260	Iron Co. (U. S. C. C. of A.)	464	struction Co., Pittsburgh	
Bernat, Erdelyi v. (C. P.)	172	Claybourn v. Allegheny		Glass Co. v.	94
Blakeley v. Marshall	41	Heating Company (C. P.)	32	Ellwood Lumber Co. v.	
Blank & Welsh, Graham v.		Clayton Electric Co. v.		Frey (C. P.)	379
(C. P.)	320	McKeesport & Wilmer-		Emmensite Gun and Ammu-	
Bodnarik v. National Slav-		ding Ry. Co.	335	nition Co. v. Pool (C. P.)	233
onic Society (C. P.)	460	Com'th v. Balph (Q. S.)	148	Erdelyi v. Bernat (C. P.)	172
Boehm v. Gloeckner <i>et al.</i>	347	Com'th <i>ex rel.</i> Bigley <i>et al.</i>		Estate, Adams' (O. C.)	331
Boggs, Chaffey v.	314	v. Ewing, White and Ma-		Estate, Bowers' (O. C.)	237
Boro. of Braddock, Strang v.	125	gee, Judges	33	Estate, Brown's (O. C.)	228
Boro. of Somerset, Hentz v.	144	Com'th v. Pittsb. Illumina-		Estate, Burns' (O. C.)	47
Bowers v. Boro. of Braddock	124	ting Co.	420	Estate, Calhoun's (O. C.)	414
Bowers' Estate (O. C.)	237				

Estate, Corcoran's (O. C.)	112	Green & Co., Limited, v. Thompson <i>et al.</i>	89	Joseph v. Richardson	138
Estate, Fleming's (O. C.)	48	Grier, County of Allegheny v.	427	Judges of C. P. No. 2, Com'th <i>ex rel.</i> Bigley <i>et al.</i> v.	33
Estate, Gannon's (O. C.)	398	Guffey v. Pittsb., Oakland & E. Liberty Ry. Co. (C. P.)	141	Kalbfell's Estate (O. C.)	210, 211, 280
Estate, Hays' (O. C.)	263	Hartman Man'g Co., Dickson v.	891	Karnes v. Rosena Furnace Co. <i>et al.</i> (C. P.)	195
Estate, Hinds' (O. C.)	156	Hartman v. Pittsb. Incline Plane Co.	146	Kaufman & Bros., Huckestein & Co. v.	90
Estate, Jackson's	299	Hartzell's Appeal	244	Kauss v. Rohner	76
Estate, Kalbfell's (O. C.)	210, 211, 280	Harvester Co. v. Hodge (C. P.)	424	Keating, Gillespie v.	328
Estate, Kerr's (O. C.)	122	Harvey, Long v.	151	Keating <i>et al.</i> v. McAdoo	343
Estate, Krebs' (O. C.)	131	Hasel v. Beilstein	457	Kelly, Schwan v.	69
Estate, Lindsay's (O. C.)	235, 435	Hasson <i>et al.</i> v. Klee	410	Kerr's Estate (O. C.)	122
Estate, Magee's (O. C.)	147	Hays' Estate (O. C.)	263	Kintz & Brubaker, Jack v.	186
Estate, Martin's	217	Hays v. Hays	239	Kirby, Dawson v. (C. P.)	234
Estate, McAuley's (O. C.)	415	Hayes <i>et al.</i> v. Treat <i>et al.</i>	231	Klee, Hasson <i>et al.</i> v.	410
Estate, McConnell's (O. C.)	209	Henderson v. Allegheny Heating Co.	283	Klein v. The Livingston Club	179
Estate, Miller's	223	Hentz v. Boro. of Somerset	144	Kleppner v. Lemon	21
Estate, Patterson's	9	Heyl <i>et al.</i> , Gaertner v.	358	Klinefelter <i>et al.</i> v. Baum	58
Estate, Poske's (O. C.)	341	Hinds' Estate (O. C.)	156	Knights of Phythias Benevolent Association of Coal Centre, Pa., v. Leadbeter	188
Estate, Schiele's	323	Hine, Smith v.	336	Krebs, Gregg v. (C. P.)	193
Estate, Silar's (O. C.)	248	Hoeveler, Pittsburgh v.	318	Krebs' Estate (O. C.)	131
Estate, Smith's	306	Hooks, Ruffner v.	86	Kuhn v. Ogilvie	161
Estate, Sutton's (O. C.)	291	Howley, Burk v. (C. P.)	46, 286	Laird v. Wack (C. P.)	111
Estate, Taylor's	344	Huckestein & Co. v. J. Kaufman & Bros.	90	Lake Shore & Mich. Southern Ry. Co., Davidson v.	386
Estate, Vogel's (O. C.)	80	Imbrie, Executor, v. The Manhattan Life Ins. Co.	113	Leadbeter, Knights of Phythias Benevolent Ass'n v.	188
Ewing, Hen. Thos., Death of	383	In re Account of W. C. Lee, Trustee, etc. (C. P.)	396	Leader Publishing Co., Palmer v. (C. P.)	300
Falck, City of Allegheny v. (C. P.)	378	In re Annexation of a Portion of the Twp. of Brad-dock (Q. S.)	198	Lee, Trustee, In re Account of (C. P.)	396
Fayette County, Murphy v. (C. P.)	413	In re Application of John Doubt (C. P.)	270	Lemon, Kleppner v.	21
Federal St. & Pleasant Valley Pass. Ry. Co., City of Allegheny v.	243	In re Application of The Accountants' Ass'n of Pgh. for a Charter (C. P.)	103	Lewis v. The Linden Steel Co. (C. P.)	395
Ferree v. Ferree (C. P.)	425	In re Assigned Estate of James White <i>et ux.</i>	207	Liberty Nat. Bank, Murphy <i>et al.</i> v.	295
Findlay, Suter v. (C. P.)	350	In re Lateral R. R. of Bessemer Coke Co. (C. P.)	227	Lindsay's Estate (O. C.)	235, 435
Finley, Willis <i>et al.</i> v.	33	In re Ohio Valley Gas Co. (C. P.)	321	Lineberger v. Newkirk	385
Fisher, Voight v.	377	In re Naturalization (C. P.)	121	Livingston, Com. v. (Q. S.)	153
Fleming's Estate (O. C.)	48	In re Petition of Fisher	159	Long v. Harvey	151
Foster v. Strayer (C. P.)	390	In re Sewer on Beechwood Ave.	317, 320	Lutz <i>et al.</i> , Beringer v.	402
Fox Solid Pressed Steel Co. v. The Schoen Man'g Co. (U. S. C. C.)	199	In re Voluntary Assignment of Bailey to Shaw (C. P.)	110	Lyuch, Young v. (C. P.)	289
Frampton, Stepp v.	432	Israel & Son, Meade, Trustees, v. (C. P.)	423	Mack v. Wright	365
Fancis v. Franklin Twp.	438	Jack v. Kintz & Brubaker	186	Magee's Estate (O. C.)	147
Fraser v. Allegheny Co. (C. P.)	412	Jackson's Estate	299	Mann v. Wakefield	260
Frazier v. The Borough of Butler	106	Jacoby v. McMahon	35	Marks v. Baker	143
Frey, Ellwood Lumber Co. v. (C. P.)	379	Jameson, Wallace v.	251, 254	Marshall, Blakeley v.	41
Friend v. Oil Well Supply Co.	257	Jarboe, Bair & Gazzam v. (C. P.)	840	Marshall v. Mellon & Galey	214
Fritz <i>et al.</i> v. Menges	447	Jessop, Plonk v.	162	Martin's Estate	217
Gaertner v. Heyl <i>et al.</i>	358	John, Christner v.	117	Mathews v. People's Natural Gas Co.	421
Galey v. Mellon	86	Johnston <i>et al.</i> v. Callery	123	Mathews v. Russell (C. P.)	9
Gannon's Estate (O. C.)	398			Maxwell, Pittsburgh v.	349
Gannon's Executors v. Central Presbyterian Church	57			McAdoo, Keating <i>et al.</i> v.	343
Giffin v. South West Penn'a Pipe Lines	52			McAuley's Estate (O. C.)	415
Gillespie v. Keating	328			McCallum v. Morris	313
Gipner v. Gipner (C. P.)	123			McConnell's Estate (O. C.)	209
Glass v. Rauwolf	67			McCutcheon v. Smith <i>et al.</i>	75
Gloeckner <i>et al.</i> , Boehm v.	347			McGowan v. Bailey	454, 456
Graham v. Blank <i>et al.</i> (C. P.)	320			McKay v. Penn'a Water Co. (C. P.)	406
Gregg v. Krebs (C. P.)	193				
Greensburg, Jeannette and Pittsb. Street Ry. Co., Penn'a R. R. Co. v.	134				

McKee, Chambers v. (C. P.)	367	Penna. R. R. Co. v. Greens-		Richards v. Willard	1
McKeesport & Duquesne		burg, Jeannette & Pittsb.		Richardson, Joseph v.	138
Bridge Co., Riverton Ferry		Street Ry. Co.	134	Richardson, The Mutual	
Co. v.	246	Penn'a R. R. Co. v. Greens-		Life Ins. Co. v. (U. S. C. C.)	182
McKeesport Machine Co. v.		burg & Hempfield Elec-		Riverton Ferry Co. v.	
The Franklin Ins. Co.	43	tric Street Ry. Co.	134	McKeesport & Duquesne	
McKeesport & Wilmerding		Penn'a R. R. Co., Rathgebe		Bridge Co.	246
Ry. Co., Clayton Electric		v.	388	Ritchey v. Ritchey (C. P.)	434
Co. v.	335	Penn'a Water Co., McKay		Robertson v. The Youghio-	
McKerrihan, Steel v.	11	v. (C. P.)	406	gheny River Coal Co.	67
McMahon, Jacoby v.	35	Penn'a R. R. Co., Waring		Rochester Tumbler Co., Nat.	
McMahon v. Sewickley Mu-		Bros. & Co. v.	49	Bank of The Republic v.	115
tual Fire Insurance Co.	449	People's Natural Gas Co.,		Rohner, Kauss v.	76
McMillin, Zahn v.	450	Mathews v.	421	Rosena Furnace Co., Karnes	
McNeal v. McNeal (C. P.)	129	Perkins-Campbell Co., Brag-		v. (C. P.)	195
Meade, Trustee, v. Israel &		don v. (C. P.)	338	Ross' Appeal	276
Son (C. P.)	423	Perkins, Saxman Bros. v.		Ross Twp., Stringert v.	399
Mellon, Galey v.	86	(C. P.)	369	Rosenthal, White <i>et al.</i> v.	93
Menges, Fritz v.	447	Phillips, Bartley <i>et al.</i> v.	281	Rowan v. Rowan	363
Mercantile Library Hall Co.		Phillipi, Com'th v. (Q. S.)	461	Rowan, Teufel v.	363
v. Pittsb. Library Ass'n	25	Philson v. The Mutual Life		Ruffner v. Hooks	86
Metzgar v. Beaver Falls		Ins. Co. of New York	303	Rule of Supreme Court of	
Boro. <i>et al.</i>	102	Pierce v. Corrigan, McKin-		Penn'a	104
Miller <i>et al.</i> , Drum v. (C. P.)	176	ney & Co. (U. S. C. C.)	219	Russell, Matthews v. (C. P.)	9
Miller's Estate	223	Pittsb., Allegheny & Man-		Rynd v. Pittsb. Natatorium	54
Millroy v. Pittsb., Bessemer		chester Pass. Ry. Co., City			
& Lake Erie R. R. Co.		of Allegheny v.	241		
(C. P.)	377	Pittsb., Bessemer & Lake		Sands v. Dwelling House	
Monongahela Bridge Co.,		Erie R. R. Co., Millroy		Ins. Co.	333
Pittsb. & Birmingham		v. (C. P.)	377	Sattler, Taylor v.	273
Traction Co. v. (C. P.)	79	Pittsburgh v. Childs	255	Saxman Bros. v. Perkins	
Monongahela Natural Gas		Pittsb. Glass Co. v. Elec-		(C. P.)	369
Co., Wright v.	128	trical Supply and Con-		Schlehl's Estate	323
Moore, Wm. D., Death of	133	struction Co.	94	Schoen, Cote v.	13
Morris, McCallum v.	313	Pittsb. & Birmingham Trac.		School Directors of Kittan-	
Morris Twp., Sprowls v.	417	Co. v. Seidell (C. P.)	441	ning Twp., Appeal of	279
Murphy v. Fayette Co. (C.		Pittsburgh & Birmingham		Schwan v. Kelly	69
P.)	413	Traction Co. v. Mononga-		Scott v. Allegheny Valley	
Murphy v. Liberty Nat.		hela Bridge Co. (C. P.)	79	Ry. Co.	83
Bank	295	Pittsburgh Illuminating Co.,		Seidell, Pittsb. & Birming-	
Murphy <i>et al.</i> , Straw v.	297	Com'th <i>ex rel.</i> v.	420	ham Traction Co. v. (C. P.)	441
Musgrave v. Dickson	85	Pittsb. Incline Plane Co.,		Sewickley Mutual Fire Ins.	
		Hartman v.	146	Co., McMahon v.	449
		Pittsb. Library Ass'n, Mer-		Sewickley School Dist. v.	
Nat. Bank of The Republic		cantile Library Hall Co. v.	25	Osburn School Dist. (C. P.)	440
v. Rochester Tumbler Co.	115	Pittsb. Natatorium, Rynd v.	54	Sheriff Man'g Co. v. The	
National Slavonic Society,		Pittsburgh v. Hoeverler	318	Pritsch Coal Co. (C. P.)	218
Bodnarik v. (C. P.)	460	Pittsburgh Natural Gas Co.,		Shrader v. United States	
Newkirk, Lineberger v.	385	Clark's Son & Co. v.	301	Glass Co.	428
		Pittsburgh v. Maxwell	349	Silar's Estate (O. C.)	248
		Pittsb., Oakland & E. Liberty		Slicker v. Schuchert	407
		Ry. Co., Guffey v. (C. P.)	141	Smith v. City of New Castle	215
Ogilvie, Kuhn v.	161	Pittsb. & Western Ry. Co.		Smith, McCutcheon v.	75
Oil Well Supply Co., Doug-		Cookson v.	394	Smith v. Reimer	274
lass Furnace Co. v.	294	Pittsb. & Western Ry. Co.,		Smithko v. Pittsburgh &	
Oil Well Supply Co., Friend		Smithko v. (C. P.)	17	Western Ry. Co. (C. P.)	17
v.	257	Plonk v. Jessop	162	Smith v. Hine	336
Oles v. The Pittsb. Times	59	Powers, Allison <i>et al.</i> v.	408	Smith v. Wachob	315
Osburn School Dist., Se-		Pool, Emmensite Gun and		Smith, White v. (C. P.)	330
wickley School Dist. v.		Ammunition Co. v. (C. P.)	233	Smith's Estate	306
(C. P.)	440	Poske's Estate (O. C.)	341	Snodgrass v. Carnegie Steel	
O'Toole v. The Post Print-		Practice—Making a Record		Co.	37
ing & Publishing Co.	458	for an Appellate Court	201	Snyder, Caldwell v.	213
				South West Penn'a Pipe	
Packer v. Packer	384	Rafston, Baldwin v. (C. P.)	311	Lines, Giffin v.	52
Palmer, Reed v. (C. P.)	310	Rathgebe v. P. R. R. Co.	388	Sproul & Co., Thompson v.	293
Palmer v. Leader Publish-		Rauwolf, Glass v.	67	Sprowls v. Morris Twp.	417
ing Co. (C. P.)	300	Reagle <i>et al.</i> v. Reagle	250	Steel, for use, v. McKerrihan	11
Patterson's Estate	9	Reimer, Smith v.	274	Stepp v. Frampton	432
Penn'a Glue Co., Limited,		Reed v. Palmer (C. P.)	310	Strayer, Foster v. (C. P.)	390
Yaryan Co. v.	373	Reese v. Wildman	167, 177	Straw v. Murphy	297
				Stringert v. Ross Twp.	399

Supreme Conclave Improved Order of Heptasophs, Buchanan v.	185	The Mutual Life Ins. Co. v. Doherty (U. S. C. C.)	65	United States Life Ins. & T. Co. v. Dougherty (C. P.)	180
Supreme Court Judgments		The Philadelphia Co., Deniston v.	14	Vogel's Estate (O. C.)	80
98, 142, 150, 220		The Mutual Life Ins. Co. v. Doherty (U. S. C. C. of A.)	192	Voight v. Fisher	377
Supreme Court Rule, Adopted October 12, 1896,	104	The Outside Judge	10	Voight v. Wallace	375
Suter v. Findlay (C. P.)	350	The Pittsb. Times, Oles v.	59		
Sutton's Estate (O. C.)	291	The Post Printing & Publishing Co., O'Toole v.	458	Wachob <i>et al.</i> , Smith v.	315
		The Pritsch Coal Co., Sheriff		Wack, Laird v. (C. P.)	111
Taylor v. Bowling (C. P.)	103	Manf'g Co. v. (C. P.)	218	Waits, Braunschweiger v.	364
Taylor v. Sattler	273	The Royal Society of Good Fellows, Wall v.	353	Wakefield, Mann v.	260
Taylor's Estate	344	The Rule in Shelley's Case—Should it be Abolished?	41	Wall v. The Royal Society of Good Fellows	353
Teufel v. Rowan	363	The Schoen Manf'g Co., Fox		Wallace v. Jameson	251, 254
The Ben Franklin Ins. Co., McKeesport Machine Co. v.	43	Solid Pressed Steel Co. v. (U. S. C. C.)	199	Wallace, Voight v.	375
The Boro. of Butler, Frazier v.	106	The Sigua Iron Co., Clark & Co. v. (U. S. C. C. of A.)	464	Washington v. White (C. P.)	338
The Butler Water Co., Brymer v.	285	The Steamboat Mayflower, Ullery v. (U. S. D. C.)	30	Waring Bros. & Co. v. Penn'a R. R. Co.	49
The German Savings & Deposit Bank v. The Braddock Union Planing Mill Co., Garnishee, (C. P.)	193	The Youghiogheny River Coal Co., Roberston v.	67	Wherry v. Wherry	249
The Huckestein Brick and Stone Co., Ltd, Bailey v.	56	The Upper Ten Mile Plank Road Co. v. Braden	105	White v. City of Meadville	97
The Linden Steel Co., Lewis <i>et al.</i> v. (C. P.)	395	Thompson v. Citizens Traction Co.	405	White <i>et al.</i> v. Rosenthal	83
The Livingston Club, Klein v.	179	Thompson, Green & Co., Lim'd, v.	89	White v. Smith (C. P.)	330
The Mansfield Coal & Coke Co. v. The Royal Gas Co. (C. P.)	70	Thompson v. Sproul & Co.	293	Wildman, Reese v.	167, 177
The Manhattan Life Ins. Co., Imbrie, Executor, v.	113	Treat, Hayes v.	281	Willard, Richards v.	1
The Mutual Life Ins. Co. v. Richardson (U. S. C. C.)	182	Ullery v. The Steamboat Mayflower (U. S. D. C.)	30	Willis v. Finley	33
The Mutual Life Ins. Co. Philson v.	303	United States Glass Co., Shrader v.	428	Wright, Mack v.	365
				Wright v. Monangahela	
				Natural Gas Co.	126
				Wyke v. Wilson	125
				Yaryan Co. v. Penn'a Glue Co., Lim'd,	373
				Yost v. Dwelling House Ins. Co.	333
				Young v. Lynch (C. P.)	239
				Zahn v. McMillin	450

INDEX OF SUBJECTS.

ACTS OF ASSEMBLY.

1853, April 8.....	Letters Rogatory.....	270
1854, February 24.....	Orphans' Court.....	245
1856, June 14.....	Common Pleas.....	896
1862, July 12.....	Attachment.....	284
1863, April 18.....	County Bridges.....	438
1863, April 17.....	Assignment.....	270
1845, April 17.....	Appeals.....	33
1849, January 24.....	Judicial Sale.....	143
1849, February 19.....	Railroads.....	17
1849, April 11.....	Party Walls.....	375, 377
1851, April 3.....	Boroughs.....	198
1855, April 27.....	Intestacy.....	209
1855, March 22.....	Change of Venue.....	251
1855, April 9.....	Railroads.....	17
1855, April 6.....	Railroads.....	227
1859, April 13.....	Limitation of Actions.....	410
1860, March 31.....	Municipal Corporations.....	879
1860, March 31.....	Criminal Law.....	412
1864, May 7.....	County Controller.....	427
1870, April 30.....	Street Improvements.....	159
1871, February 17.....	Railroads.....	227
1871, June 2.....	Boroughs.....	198
1872, April 9.....	Wages.....	310
1874, April 22.....	Corporations.....	331
1874, April 29.....	Corporations.....	115
1874, April 29.....	Water Companies.....	99, 102, 235
1874, May 14.....	Charters.....	380
1874, May 23.....	Municipal Corporations.....	97
1874, June 13.....	Municipal Corporations.....	124
1875, March 20.....	Change of Venue.....	251
1876, March 31.....	County Officers.....	427
1876, April 20.....	Wages.....	310
1876, May 6.....	Attachments.....	195
1881, June 8.....	Defeasance.....	210
1883, June 20.....	Satisfaction of Mortgage.....	182
1885, May 29.....	Eminent Domain.....	321
1885, June 30.....	Intestacy.....	209, 291
1887, May 13.....	Liquor License.....	179
1887, May 23.....	Wages.....	9
1887, May 23.....	Evidence.....	336, 437
1887, June 3.....	Married Women.....	161, 172, 188
1889, April 14.....	Attachments.....	195
1889, May 14.....	Street Railways.....	131
1891, May 16.....	Street Improvements.....	375, 159
1891, June 11.....	Evidence.....	78
1891, June 16.....	Salaries.....	109
1891, June 16.....	County Officers.....	431
1893, May 11.....	Buildings.....	365
1893, May 23.....	Fees.....	413
1893, June 3.....	Married Women.....	161, 172, 188
1893, June 6.....	Schools.....	276, 279
1895, May 21.....	Condemnation of Land.....	14
1895, May 22.....	Taxes.....	103
1895, June 24.....	Gas Companies.....	420
1895, July 2.....	Schools.....	440

ACTION, RIGHT OF. Guardian of minor children who have instituted suit against railroad company to recover for personal injuries to mother, cannot share in proceeds of settlement of suit brought by mother against railroad and continued by administrators after her death, the guardians having joined in the settlement..... 344

ACTS OF ASSEMBLY, CONSTRUCTION OF. Acts of April 29, 1874, and May 23, 1874, relating respectively to incorporation of water companies for supplying water to cities and authorizing cities of third class to supply water to public, are to be construed so as to give effect to each, if possible..... 97

ADMINISTRATORS AND EXECUTORS. Executor bound by compensation fixed by testator's will unless extraordinary services are required and rendered. (O. C.)..... 263
 Executor who procures and files appraisal of testator's interest in firm and who assists surviving partner, who is irresponsible, in continuation of business, is liable, and measure of liability is appraisal. (O. C.)..... 280
 When rehearing will be allowed executor in such a case..... 1b

ADMINISTRATORS and EXECUTORS—Continued.

In absence of complaint from persons interested, executor who is indebted personally and as executor to person who has bought out heirs, can agree with him that in case he bought land about to be sold by executor, the amount of said indebtedness should be deducted from purchase money. Such agreement is enforceable though sale has been confirmed by court on the usual terms..... 306

ADMIRALTY LAW. Former owners of vessel, sold by them with general warranty deed, lose their lien thereon by their own act and cannot maintain libel. (U. S. D. C.)..... 80

AFFIDAVIT OF DEFENSE. In action for price of land sold free of encumbrances, defense that a company exercising right of eminent domain has surveyed ground and adopted line for proposed road thereon, is sufficient, as it shows encumbrance on land..... 123
 Unequivocal denials of material allegations of claim and material allegations of fact in affidavit of defense, are to be taken as true..... 1b

In action for balance due on building contract where statement shows that building was torn down because of alleged negligence of architect and contract given to another; that building was not completed within specified time, an excuse being given therefor, what will be considered sufficient affidavit of defense to prevent judgment..... 295

Amended affidavit of defense may be made where it merely enlarges and makes more definite statements of affidavit..... 353

When amendments to will not be granted at trial..... 373

APPEALS. Where several different plaintiffs recover judgment against gas company for injuries resulting from the same explosion, and one is appealable to Supreme Court and the others to Superior Court, the lower court may stipulate that the other cases shall be held pending appeal to Supreme Court. (C. P.)..... 32

Appeal by defendants from a decree in equity requiring defendants to remove flat boats from front of plaintiff's property, the recognizance will not act as *supersedeas* unless it provides for damages as well as costs..... 33

Appellee entitled to have case disposed of on record as it stands when it neither shows exception to charge or that copy filed was approved by judge..... 117

When writ of *certiorari* to Common Pleas, issued without allowance before trial, is not *supersedeas* and should be quashed..... 254

When appeal in equity to Supreme Court is not a *supersedeas*. (C. P.)..... 301

Appeal from decree appointing receiver does not act as *supersedeas*..... 1b

Questions not raised by assignment will not be considered..... 358

Appeals, act regulating practice, costs and fees on appeals..... 442

APPEALS FROM JUSTICES. See Defenses.

APPEARANCE. In suit against partnership, general appearance for partnership at request of one partner will not prevent other partner, who subsequently alleges he had no knowledge of suit, from opening judgment on question whether he was partner or not. (C. P.)..... 218

Entry of appearance without authority not conclusively binding on person for whom appearance is entered..... 1b

ARBITRATION. See Equity.

Differences submitted to arbitrators by written agreement, whose award is final, is conclusive in absence of fraud or misbehavior..... 90

Party submitting item not within terms of the matter submitted for arbitration, if presented to arbitrators and passed upon, is estopped from denying right of arbitrators to consider it..... 1b

- ASSIGNMENT.** What will constitute equitable assignment of stock subscriptions. (C. P.)..... 465
- ASSIGNMENT FOR CREDITORS.** Under what circumstances assignee for creditors should be surcharged for goods of assignor sold by him. (C. P.)..... 110
- Under what circumstances an order of court for the sale of real estate in hands of an assignee will be granted..... 207
- Assignment by insolvent debtor of goods and book accounts to another in trust for a certain creditor is unlawful and inures to benefit of all..... 280
- ASSISTANT DISTRICT ATTORNEY OF ALLEGHENY COUNTY.** Salary of, by Act of 1871, is \$1500 a year..... 431
- ATTACHMENT.** What return of constable to attachment, under Act of July 12, 1842, should show. (C. P.)..... 234
- What articles are subject to attachment under this act..... 1b
- ATTACHMENT EXECUTION.** Money coming into hands of garnishee after plea filed and case at issue not bound by attachment. (C. P.)..... 193
- After plea filed and case at issue plaintiff cannot file interrogatories and require additional answers..... 1b
- Judgment creditor against garnishee cannot of his own volition, without levying execution on his judgment against garnishee, substitute himself use plaintiff in judgment which his debtor holds against garnishee and issue process for its revival and collection..... 249
- What answer of garnishee will admit entry of judgment thereon..... 313
- BAILEY, HON. JOHN H.** Tribute of the Bar of Allegheny County on the death of..... 265
- BANKRUPTCY LAW.** Article on..... 163
- BENEFICIAL SOCIETIES.** Request of beneficiary under benefit certificate in fraternal society to be notified of non-payment by person holding certificate, who is insane, will prevent suspension of certificate for non-payment if no notice is given..... 185
- Under what circumstances will woman living with man, but not his wife, and by whom he has children, be entitled to proceeds of benefit certificate after his death, which provides that proceeds shall go to his "wife and children," it appearing that he has a wife living with whom he has not lived for years. (C. P.)..... 460
- BINDING INSTRUCTIONS FOR DEFENDANT, REFUSAL OF.** See Question for Jury.
- BOROUGH.** In annexation of part of township to borough, under Acts of 1851 and 1871, only citizen of part annexed can appeal. (Q. S.)..... 198
- BRIDGES, LIABILITY FOR INJURY RESULTING ON.** Township not liable for injury resulting to person from defective bridge, entered of record as county bridge by Act of 1838, and which county must keep in repair by Act of 1843. 438
- BURDEN OF PROOF.** See Fraud.
- In ejectment where defendant's title comes through sale upon mortgage where record shows issuing of *sci. fa.*, *lev. fa.* and deed to the defendant; if plaintiff's claim mortgage was paid before *sci. fa.* issued and offer receipts for payment, the genuineness of which defendant denies, burden of proof to establish genuineness of receipts is upon plaintiff..... 428
- CHARGE OF COURT.** In an action for personal injuries resulting from malpractice, where the case depends on expert testimony, court should use great care in its instructions to jury as to question involved..... 1
- CHARGE ON LAND, HOW ENFORCED.** See Orphans' Court.
- CHARITIES.** See School and School Law.
- CHURCH LAW.** Rules of church, when not contrary to law, will be enforced by church in disputes between church factions..... 151
- Where by the laws of religious body each congregation is independent of the others, the calling in by the majority of one congregation the aid of other congregations who aid in deposing officers supported by minority, is unlawful..... 1b
- CLUBS.** See Liquor Law.
- COAL, HOW IT MAY BE CONSIDERED IN LAW.** The four cases relating to the character into which coal and its proceeds may fall, set forth. (O. C.)..... 228
- COAL LANDS.** See Widow's Estate
- CONDEMNATION PROCEEDINGS.** In condemnation proceedings incompetent to show that there is danger if gas escapes from pipe line that buildings will be burned..... 14
- In condemnation proceedings testimony of danger of leaks in pipe line which would depreciate the property is incompetent..... 1b
- In action for condemnation of land under Act of May 21, 1885, party desiring jury to view premises must request it before closing his case in chief..... 1b
- CONFIDENTIAL RELATION.** See Partnership
- Fraud.
- What relation between two persons will be considered such a confidential one that upon bill in equity filed by one to recover property conveyed by him to the other, the burden will be upon the latter to show the transactions between them were freely and voluntarily entered into by both, and further, what facts in such a case will justify the finding that transfer was to the defendant in trust for the plaintiff..... 457
- CONSTABLE.** See Fees.
- CONSTITUTIONAL LAW.** See Schools.
- CONTRACTS.** What parol evidence, upon proof of the loss of a written contract providing for the building of a house, establishes the substance of a valid agreement..... 13
- Meaning of written contract may be determined by circumstances surrounding its making..... 43
- Right to recover on contract by which, in consideration for services, plaintiff was to have decedent's estate, does not accrue until decedent's death..... 76
- Traction company which makes agreement with bridge company to make certain improvements on its bridge in consideration of reduction in tolls, cannot recover amount so expended from city by which bridge has been bought and made free to public. (C. P.)..... 79
- That construction in action on contract is to be placed thereon which both parties to contract place on it..... 126
- Under what circumstances contract for drilling for oil may be assignable..... 66
- In action on contract for merchandise sold, where order is given by telegram which contained the words "particulars by letter," the letter is part of contract and the conditions therein as to quality of goods bind defendant..... 138
- Plaintiff and defendant contracted that "it is further agreed that the party of the second part will not engage during the life of this agreement in the manufacture of truck frames for moving vehicles or any part of such frames when made of pressed steel." At date of contract and thereafter plaintiff manufactured pressed metal truck frames exclusively and defendant manufactured pressed metal parts of diamond truck frames with knowledge of plaintiff. Held, this clause prohibited defendant from making pressed metal truck frames and parts of such frames. (U. S. C. C.)..... 199
- Under what circumstances can meaning of words that roadbed shall be "excavated and prepared" in contract for constructing electric railway be explained by testimony of experts..... 335
- Contract between school district and member of lumber company for erection of school house is void if another member of company is one of school directors, if contract is for benefit of company. (C. P.)..... 379
- CONTROLLER OF ALLEGHENY COUNTY.** Salary of, fixed at \$3,000 by Act of May 7, 1881..... 427
- County can compel controller to refund money received by him in excess of law..... 1b
- CORPORATIONS.** In absence of by-law or fixed practice, notice of meeting of board of managers of company, is insufficient if not received by members of board before morning of day of holding meeting..... 26
- Notice of special meeting of corporation to hear treasurer's report and transact other business is insufficient when business actually transacted involves surrender of active duties of corporate trust..... 1b
- Under what circumstances will a corporation, formed for purpose of erecting building for use of an association, the charter containing certain stipulations as to the lease, be considered to have violated the terms of its charter in making the lease..... 1b
- Subscribers to corporation, who falsely swear ten per cent. of capital stock is paid in, are liable to persons actually misled. (C. P.)..... 340
- Street railway company which lets space in its cars

CORPORATIONS—Continued.

- for advertising can recover contract price therefor if defendant has received benefit of advertisement, though contract is *ultra vires*. (C. P.)..... 441
- CORPORATIONS, INCORPORATION OF.** Application for charter loosely fastened together with red tape will not be granted. (C. P.)..... 108
- What application for charter should state..... 1b

CRIMINAL LAW. Prosecution for false pretense not maintainable where sale of goods out of which false pretense arose took place in county other than the one in which prosecution is instituted. (Q. S.)..... 148

- Indictment charging larceny of goods belonging to A. can be amended and conviction had thereunder where evidence shows goods belonged to A. and B. (Q. S.)..... 153
- Alteration of lease executed by lessor before signing it and return thereof to lessor does not make lessee guilty of forgery..... 358
- Under what circumstances will alteration of lease by lessee not afford probable cause to lessor for charging forgery..... 1b
- What is necessary to constitute gambling-house. (C. P.)..... 481
- What is a common gambler..... 1b
- Act relating to gambling and its construction..... 1b

DAMAGES. In condemnation proceedings, damages caused by negligent operation of pipe line for gas, cannot be considered..... 14

Court can set aside verdict because of inadequate damages. (C. P.)..... 360

- In libel suit, where no special damage is shown and nominal damages are found by jury, court will not grant new trial..... 1b
- What is measure of damages resulting from raising grade of township road and maintaining railroad track thereon without consent of abutting owners, stated..... 405

DECEDENTS' ESTATE. See Partnership.

- Accountant paying preferred debts before notice of adverse claimants to funds, entitled to credit and such claimants entitled to preference in subsequent distributions. (O. C.)..... 112
- Direction in will to sell real estate for purpose of distribution to legatees does not constitute lien of general debts beyond statutory period, and general creditors not entitled to distribution in proceeds of sale made after that time. (O. C.)..... 248

DEFEASANCE. Grantee cannot be prejudiced by failure of grantor, to whom he has delivered a defeasance, to record it as required by Act of June 8, 1881. (O. C.)..... 211

DEFENSES. No defense for bail for appeal from justice, whose principal has not perfected his appeal that his principal was not indebted to plaintiff. (C. P.)..... 310

- Neither can bail defend on ground that justice failed to adjudge that suit was for labor if this appear on record..... 1b
- Bail in such case cannot defend on ground that case has not been adjudicated if recognizance was given under Act of April 9, 1872..... 1b
- Plaintiff can issue execution against defendant and still proceed against the bail..... 1b
- Purchaser of land upon judgment cannot defend to a *sci. fa. sur* mortgage upon it, in which he is made *terre-tenant* on ground that one of mortgagors, who was surety for the other, was released by mortgagee before issuing *sci. fa.* (C. P.)..... 311
- What will be considered sufficient affidavit of defense to *sci. fa. sur* purchase money mortgage, where one claiming paramount title to that of mortgagee has taken possession of part of mortgaged lands..... 314

- In action by limited partnership to recover for machine sold to defendants, who paid part therefor and kept machine, latter cannot defend on the ground that plaintiff had not complied in making contract with Act of 1874, under which it was incorporated..... 373

DEVISE. Condition in devise of real estate that property shall not be sold until devisee obtains age of thirty years, is good..... 383

DISTRIBUTION AMONG HEIRS. How money recovered in action brought by widow of deceased for injuries received by husband through negligence of defendant is distributable to widow and children..... 408

DIVIDENDS. Under what circumstance, where street railway charter provides that railway declare certain profits in discretion of directors, and also that it pay the city in which it operates a percentage of profits declared, will it be considered

DIVIDENDS—Continued.

- that transfer by stockholders of stock in exchange for stock in another railway in same city at ratio of eight shares of latter company to one of former, is not dividend which could be taxed under provision of charter of first named company..... 241
- Where charter of street railway provides that it pay city in which it is located certain percentage on dividends declared by directors, under what circumstances will increase of capital stock of railway not be considered stock dividend upon which city can levy tax..... 1b

DIVORCE. Plaintiff in divorce (the wife) is entitled, after appeal to Supreme Court, to amount decreed *pendente lite* by court to be paid monthly by defendant to plaintiff prior to appeal, case being decided in plaintiff's favor..... 129

- In action for divorce on ground of desertion, what facts necessary for libellant to show to make out case of willful and malicious desertion. (C. P.)..... 425
- What testimony will be insufficient to justify granting of divorce on ground of adultery. (C. P.)..... 424

EJECTMENT. See Burden of Proof.

- An heir, who has at the proper time been cited to appear and make objections to a sale cannot, eight years after the sale, by the administrator, bring ejectment against purchaser on ground that the sale was private and unauthorized..... 85
- Ten years after testator's death administrator was appointed and his land sold for payment of debts under order of Orphans' Court. *Held*, that thirty years thereafter ejectment would lie by heirs of testator's, who were minors at the time of sale, as no title passed by sale..... 167, 177
- In ejectment against church, proof that plaintiff told wife of one of church members not a trustee, of her claim, is not notice of claim to church..... 321
- In ejectment by lessees of land for oil and gas against lessees of person to whom person had sold the land, question whether plaintiffs had terminated lease by forfeiture or abandonment is *fact in pais*, which can be proved by evidence *dehors* the lease..... 261
- In such case what evidence will put defendants on inquiry as to whether plaintiffs had forfeited their lease..... 1b
- Judgment against plaintiff in equitable action of ejectment in State Court is conclusive of title of plaintiff in pending action in United States Court of same State for same land. (U. S. C. C.)..... 292
- In ejectment by remainderman against one in possession, record of former ejectment between life-tenant and present defendant cannot be put in evidence..... 385
- In ejectment genuineness of signature to deed and sanity of grantor are issues for jury..... 1b
- What evidence in action of ejectment against husband and wife will justify jury in finding that land, which was in husband's name, belonged to his wife..... 402
- In ejectment, continuous, adverse possession, on part of defendant for twenty-one years, will raise presumption of execution and delivery of deed to person through whom defendant claims..... 410
- Where defense is adverse possession entry by plaintiff, where entry is not followed by suit within one year, does not stop the running of the statute. 1b

EMINENT DOMAIN. Under what circumstances natural gas company of another State can exercise right of eminent domain in this State. (C. P.)..... 321

What necessary for gas company, desiring to exercise right of eminent domain, to set forth in petition to court..... 1b

EQUITABLE ASSIGNMENT. See Assignment.

EQUITY. See Injunction—Confidential Relation.

- Bill in equity, by vendees of land to rescind sale on ground of fraud, may be maintained though vendors have obtained judgment upon purchase-money mortgage given by vendees..... 69
- Owner of land, who has conveyed coal thereunder to another, reserving the right to drill one well through the coal for water, will not be restrained from drilling for oil or gas, if the existence of latter was not contemplated at time of conveyance by either party. (C. P.)..... 70
- In such case well must be drilled at a point least likely to interfere with owner of coal..... 1b
- Bill in equity, for joint benefit of creditors of corporation, cannot be maintained. (C. P.)..... 340
- When courts will interfere on ground of fraud or mistake, which lead arbitrators to wrong conclusion. (C. P.)..... 367
- When preliminary injunction to restrain building of railroad, which runs through defendant's yard in a borough, will be refused. (C. P.)..... 377

ESTOPPEL. See Mortgage.

In an action against surety for contractor on building contract by owner of house, where contract provides that release of mechanics' liens shall be furnished by contractor, what evidence to the effect that surety requested owner to pay the contractor and forego the requirements of release of mechanics, which the owner did, though the liens were not paid, will justify jury in finding for plaintiff..... 407

EVIDENCE. Under Act of June 11, 1891, in action against defendant's administrator, witness called by the latter, who testifies to conversation occurring in his presence between plaintiff and decedent, the plaintiff may then be allowed to state what his conversation was..... 78

On issue as to whether goods were purchased under fraudulent representations as to purchaser's financial standing, evidence of purchasers subsequently made admissible in connection with evidence of previous purchasers to show intent of purchase to obtain large quantity of goods and then profit by insolvency..... 93

In action to recover damages for continuance of nuisance, judgment for plaintiff in former action concerning same subject-matter, is conclusive of existence of nuisance..... 146

In such case record of first action admissible though statement claims consequential damages, which statement in second does not, if it appears that in first action it was decided consequential damages could not be recovered..... Ib

Notes of witness given at former trial, who is absent by reason of sickness, are admissible. (Super. Ct.)..... 183

Declaration of burgess, not made in line of his duty, not evidence against borough..... Ib

Where person employs another by written agreement to complete oil well and subsequently makes verbal agreement with latter for cleaning it out, in suit to recover on verbal contract, written agreement is evidence to explain it..... 273

When opinion of expert witness not admissible..... 308

Where decedent loaned money to another and took mortgage therefor, upon which interest was paid, testimony of declarations of mortgagee at time mortgage was given, that she gave money secured by mortgage to mortgagor as present, does not establish it as a gift..... 323

Parol evidence that money so loaned was not to be repaid, but merely interest thereon during mortgagee's life, cannot vary mortgage unless such stipulation was omitted from mortgage by mistake or fraud..... Ib

Admission and subsequent withdrawal of incompetent evidence no ground for continuance or reversal..... 368

In action on contract for employment, which does not specify time for which employee is hired, testimony of employee that he was hired for year inadmissible..... 391

Under what circumstances can married woman testify as to declaration of her husband, corroborative of her claim in action by her against her husband's father's estate, her husband being defendant in his capacity as executor..... 437

EWING, HON. THOMAS. Meeting of the Bench and Bar of Allegheny County on the death of..... 383**EXCLUSIVE FRANCHISES.** See Gas Companies.**EXECUTION.** See Wages.

Creditor having execution and levy subsequent to defendant's assignment cannot object to prior levies made before the assignment, though sale on prior levies has been delayed for long time by sheriff..... 328

EXECUTORS. See Administrators and Executors.**EXEMPTION.** Defendant, in judgment against him for board, cannot claim benefit of exemption laws upon judgment against garnishee, who admits certain amount due defendant for wages. (C. P.)..... 195**EXPERT TESTIMONY.** See Contracts.**FALSE ARREST.** What will justify arrest without an information. (C. P.)..... 46

In action for false arrest, verdict will be sustained against defendant if guilty for subsequent detention of plaintiff, but not of the arrest..... Ib

Person at whose instance, and with whose knowledge and consent another is arrested, becomes liable, if arrest is unlawful..... 266

If arrest in such case is without knowledge of defendant, he is liable, if he subsequently became party to the continuing of the imprisonment..... Ib

FALSE ARREST—Continued.

Facts and circumstances which amount to probable cause are questions of law, and whether they exist is for jury..... 266

FEEES. Under Act of May 23, 1893, constable entitled to fifty cents for each person upon whom he serves subpoena issued by justice. (C. P.)..... 413**FERRY COMPANIES.** Incorporated ferry company, entitled to actual damages from bridge company, subsequently incorporated, which takes its landing and piers of which interfere with ferry route..... 246

In such case ferry company cannot enjoin building of bridge after bridge company has expended much money for building it..... Ib

Ferry company not entitled to loss resulting from competition..... Ib

FRAUD. See Evidence—Partnership.

In action of replevin for goods, which defendant agreed to exchange for land of plaintiff, where jury find that trade was not induced by plaintiff's fraud, defendant is not injured by refusal of court to charge that one may refuse performance of contract which he thinks was induced by fraud..... 67

What statement, by a purchaser of goods as to his financial standing, will be considered a fraud upon the person selling goods to him, sufficient to sustain an action for deceit..... 96

In action by bill in equity to compel reconveyance of property, where it is alleged that plaintiff, who was weakened mentally and physically, had been taken advantage of by defendant, who had secured plaintiff's confidence, what facts will be considered sufficient to justify the finding that assignment of property was obtained by fraud, and that the relationship existing between them was of a confidential nature and threw upon defendant burden of showing transaction was fair... 432

GAMBLING. See Criminal Law.**GARNISHMENT.** See Attachment—Execution.**GAS COMPANIES.** Plaintiff company was chartered with exclusive franchise for furnishing gas for light for city, May 19, 1871. Defendant was chartered for same purpose and for same city, May 8, 1895. After *quo warranto* had been instituted by plaintiff counsel stipulated decision should be limited to whether defendant was entitled to furnish gas for light only, this to depend on whether exclusive privilege was vested in plaintiff. *Held*, that exclusive privilege vested in plaintiff and that constitutionality of Act of June 24, 1895, could not be tested under the above stipulation..... 420**GIFT.** See Evidence.**GUARDIAN AND WARD.** See Subrogation.**HAYMAKER, SEWARD W.** Meeting of the Bench and Bar of Allegheny County Bar on the death of..... 257**HUSBAND AND WIFE.** See Married Women.

Deed direct from husband to wife is valid, though deed from wife to husband, without latter joining, is void..... 250

Husband cannot claim land by adverse possession upon which he is living, which is in wife's name, and upon which he pays taxes..... Ib

Husband cannot be tenant by curtesy of wife's estate in remainder unless particular estate be ended during coverture. (C. P.)..... 289

First section of Intestate Act of April 8, 1893, removes necessity of birth of issue, but nothing more, to enable husband to be tenant by curtesy.. Ib

INHERITANCE, WORDS OF. Where possession of land is given by written agreement, what words will be construed to be a present grant of inheritance to the grantee with conditions attached which, if performed, give grantee estate in fee..... 447**INJUNCTION.** Where property rights will be damaged by commission of indictable offense by club, member thereof can enjoin it..... 179**INSURANCE, FIRE.** See Proximate Cause—Beneficial Societies.

That interpretation of life insurance policy should be adopted which is more favorable to insured.... 43

Insurance company is chargeable with knowledge of the customary methods of conducting business property which it insures..... Ib

Under what circumstances, where manufacturing plant consisting of two buildings is insured, together with the appliances in each, will insurer be liable for appliances of one building burned in the other..... Ib

INSURANCE, FIRE—Continued.

- Agreement in policy to submit disputed questions to arbitrators, to be afterward agreed upon, is revocable at any time..... 338
- Land devised to A. forever, but without right to sell until he becomes thirty, does not make him such an conditional owner as to avoid policy, which stated A. was unconditional owner..... 1b
- When existence of unpaid assessment no defense in action on fire insurance policy..... 449

INSURANCE, LIFE. Beneficiary in insurance policy is entitled only to surplus remaining after creditor, to whom insured had assigned policy as collateral security for a debt, is paid. (O. C.)..... 47

- In action on policy, where it appears agent of defendant received notes from decedent for premiums without authority, which in time defendant receives from agent in settlement of balance with him, question for jury whether defendant received notes in payment of premiums..... 113
- In action by assignee of policy against company, where waiver of notice of assignment required by policy is denied by defendant, where such waiver is sought to be established by letter of secretary of defendant, question of whether such letter operates as waiver is question of law..... 303
- In action on life insurance policy, what answers to questions by deceased in his application, will permit defendant to show as defense that applicant had consumption or any disease tending to shorten his life..... 353

INTESTATE LAWS. Act of June 30, 1885, relating to intestates, repeals Act of April 27, 1855, only so far as it provides for *per stirpes* distribution. (O. C.)..... 209

- Purpose of Act of 1885, relating to descent of state to persons standing in equal degree, set forth. (O. C.)..... 291

JUDGMENT. See Partnership.

- Amicable *sci. fa.* to revive, made within five years, will not bind land in hand of *terre-tenant* whose deed is on record at the time. (C. P.)..... 351
- In such case *alias sci. fa.* to revive against *terre-tenant* after expiration of five years will not bind land in his hands..... 1b
- When will transcript of record of alderman, filed in Common Pleas for purpose of lien, be considered in proper form for that purpose. (C. P.)..... 369

JUDGMENT BY CONFESSION, ENTRY OF.

- Authority in lease to enter judgment after default of five days means five full days exclusive of Sunday..... 103

JUDGMENT, ISSUE TO TRY VALIDITY OF.

- What creditors entitled to try validity of judgment, and what necessary for petition to set forth. (C. P.)..... 423
- What evidence will be sufficient to justify granting issue..... 1b

JUDGMENT NOTE. See Partnership.

JUDGMENT, OPENING OF. When petition to open judgment will be considered irregular..... 315

- Person is precluded from opening judgment for want of consideration if it appear by his petition that at former attempt to open judgment, on ground of forgery, there was evidence that there was no consideration for judgment note..... 1b
- In trial of issue to determine whether judgment note had been obtained by fraud, where defendant's evidence is that it was given as purchase price of farm, the oil wells upon which plaintiff misrepresented, error for court to charge that, if parties dealt under mutual mistake, defendant could avail himself of such mistake..... 364

JUDICIAL DISCRETION. Discretion of court will only be reversed in ordering sale of lands in hands of assignee for creditors upon clear abuse and manifest disregard of plain rights of creditors. 207

JURISDICTION OF FEDERAL COURTS.

- Under what circumstances removal of case from State to United States Courts will be allowed, though time fixed by statute for such removal has passed. (U. S. C. C.)..... 219

JURY PANEL. When challenge to array of jurors will be quashed..... 251

LAND, RIGHT TO SUPPORT OF SURFACE.

- Where mineral estate in land is separated from surface, owner of latter entitled to support of surface from owner of mineral estate unless owner of surface has released right to support..... 67

LANDLORD AND TENANT. Acceptance of overdue rent does not waive stipulation in lease, which provides that failure to pay rent within

LANDLORD AND TENANT—Continued.

- five days after it becomes due shall render due and payable rent for whole year, and landlord can claim rent for year in distribution arising from judicial sale..... 363

LEGACIES. Where land is directed by will to be sold and proceeds divided among the children, and further, if any of children should die without issue share of such child should go to survivors, the legacies vest absolutely. (O. C.)..... 331

- In such a case, where children take land by partition, and without conversion, partition vests title in them absolutely..... 1b
- Bequest by will was made to legatee, which provided that it should be paid to him personally when he came for it. After death of testatrix he appeared and demanded legacy, which administrator could not pay. *Held*, that assignment by legatee of legacy to third person was valid and that latter could demand its payment at distribution of estate..... 217

LETTERS ROGATORY. When letters rogatory from another State, requesting testimony to be taken in Pennsylvania, will be refused. (C. P.)..... 270

- How witnesses must be examined under Act of April 8, 1833, relating to letters rogatory..... 1b
- Plaintiff, who obtains judgment after service of process in another State, cannot have letters rogatory to county of another State where he is a resident and where he could have sued defendant, to use in county where he obtained judgment..... 1b

LIBEL. See Damages.

- To say that neighbors of a woman say she is a witch and bewitched a boy is libel, and cannot be defended on ground that neighbors actually said so. (Super. Ct.)..... 59
- Such libel is not privileged communication..... 1b
- When not error to refuse to charge that publication, not being libelous *per se*, there being no allegation of special damage, verdict must be for the defendant..... 251
- When question of, whether defendant had exceeded their privilege, plaintiff being candidate for public office, becomes question for jury..... 1b
- In action for testimony of plaintiff as to conversation concerning retraction between her and agent of defendant, a corporation, three weeks after libelous publication, is admissible when authority of agent is not questioned..... 453
- Plaintiff can testify to manner in which libel damaged her..... 1b

LIEN ON LAND. Mortgage given in real name of mortgagor, which includes his middle initial, bind his lands in preference to subsequent judgment entered in the same name as that by which he holds title to the land, which is his correct name, except that middle initial is left out, (U. S. C. C.) 65. Affirmed. (U. S. C. C. A.)..... 192

LIFE ESTATE. Sale of land on judgment against vendor, who sold land with proviso that vendee was to permit him to live on land as long as he lived, need not be sold under special provision of Act of January 24, 1849, relating to sale of life estates. (Super. Ct.)..... 143

LIFE TENANT. See Oil and Gas Rights.

LIMITATION OF ACTION. Statute of, does not apply to subscription of corporate stock where delay was result of corporate policy in which subscriber united as director. (O. C.)..... 235

- Bar of statute to claim against decedent's estate not removed by provision in will that executors should pay claim out of uncollectible life insurance policy. (O. C.)..... 396

LIQUOR LAW. Furnishing by club to its members of liquor, each paying cost of what he consumes, is not a sale..... 179

MALICIOUS PROSECUTION. What requisites necessary to constitute grounds for an action of. (Super. Ct.)..... 86

- Discharge of or acquittal of plaintiff does not throw burden of proof upon defendant to show probable cause, if plaintiff's own testimony shows its existence..... 1b
- Homicide affords probable cause for prosecution..... 1b

MALPRACTICE. See Negligence.

- What evidence will justify binding instructions for defendant in action against physician for malpractice..... 1

MARRIED WOMEN. See Wills.

- Since Act of June 3, 1893, married woman may mortgage her estate for security of her husband's debt,

MARRIED WOMEN—Continued.

- Including future advances or any one else, as well as before..... 161
- Contract by married woman to trade real estate must be acknowledged separate and apart from husband. (C. P.)..... 172
- Under what circumstance contract to sell real estate to married woman, made through her husband, will be set aside for fraud..... 1b
- Since Act of 1883, burden of proof is still upon married woman when claiming against her husband's creditors, property conveyed to her during coverture, that it was purchased out of her own estate or gift to her..... 186

MASTER AND SERVANT. In action to recover for services to decedent as nurse, based on *quantum meruit*, set-off cannot be made by showing amount of board paid plaintiff by decedent, who lived in house of latter, and value of portion of house occupied by plaintiff..... 274

MECHANIC'S LIENS. One bound by bond to deliver to owner building free of lien, or any charge whatsoever, cannot have a lien himself on building without being bound to remove it, and cannot enforce it..... 54

Surety for fulfillment of building contract, providing that there shall be no lawful claims for work or material to original contractor, cannot file lien for material furnished by himself..... 57

In *act. fa.* on mechanic's lien, sufficiency of lien on its face cannot be attacked under plea of *non-assumpsit*, set-off and payment with leave..... 58

When all provisions of statute, relating to lien are complied with, it is presumed materials were furnished or work done on credit of building..... 89

This presumption may be rebutted by evidence that lumber did not go in building..... 1b

One member of partnership satisfied mechanic's lien. Other member then filed petition to have this satisfaction stricken off. The contractor by agreement paid money into bank to await determination of question and second satisfaction of lien is then entered by second partner. Court discharged rule to strike off first satisfaction. *Held*, that it then should make absolute rule on bank to pay to contractor..... 297

MOORE, W. D., ESQ. Meeting of the Bar of Allegheny County on the death of..... 133

MORTGAGE, FORECLOSURE OF. See Defenses—Trusts and Trustees.

Where husband deeds property to his wife without consideration, who gives mortgage to husband's son, the wife thinking she was getting life estate with remainder to son, and later husband in settlement of a controversy agrees that his wife should have property in fee, son is entitled to foreclose mortgage on death of the wife..... 239

In such case, where son knew terms of settlement, and assented to them, but did not understand his rights and did not know of his interest in mortgage, he is not estopped from claiming under mortgage..... 1b

MORTGAGE, SATISFACTION OF. Satisfaction of mortgage made in 1873 and payable in New York with legal rate of interest at seven per cent. by proceedings under Act of June 20, 1883, relating to satisfaction of mortgages held by persons without the State, cannot be made if decree require the amount of interest to be paid to be six per cent., the legal rate of interest at the time of satisfaction. (U. S. C. C.)..... 182

Such a decree being void does not prevent issuing of *act. fa.* on mortgage from Circuit Court..... 1b

MUNICIPAL CORPORATIONS. See Water Companies—Negligence.

Cities of third class may erect or authorize others to erect water works, but the use of one method precludes the other..... 97

When distinct grants to different corporations for the same public purpose exist, courts will hesitate in assuming that if Legislature intended the exercise of their franchises so as to take property of any of them without compensation..... 1b

MUTUAL MISTAKE. Question of whether there was mutual mistake in an alleged settlement is for jury..... 117

NATURAL GAS COMPANIES. See Eminent Domain.

NATURALIZATION. What every applicant for naturalization should know. (C. P.)..... 121

No law imposes duty of naturalization on State courts..... 1b

NEGLIGENCE. See Presumptions.

- Plaintiff, in action against physician for malpractice, cannot recover when injury caused to himself by his own neglect, and the injury resulting from alleged malpractice cannot be separated..... 1
- Employee injured by the explosion of his employer's boiler must show affirmatively that defendant was liable for explosion..... 37
- In such a case, evidence that plaintiff told one of defendant's employees that engineer running the boiler was incompetent, is insufficient to show he was incompetent..... 1b
- Neither will testimony of plaintiff that he told defendant's manager that engineer of boiler was incompetent be sufficient to sustain verdict for plaintiff when denied by manager..... 1b
- Where change of grade of street is ordered by borough, it is duty of authorities that it be made without danger to travellers, and where accident results it is for jury to say whether it was necessary to deposit on street material used in grading. Fact that owner of lot abutting on street on which dirt is deposited in grading street, is councilman, does not render borough negligent in action for personal injury resulting from condition of street. Plaintiff who falls into hole on lighted part of street familiar to her, which had been there for years, cannot recover. (Super. Ct.)..... 144
- In action against mechanic who was employed by plaintiff to put in gas fixtures, for injury resulting from imperfect work, whether it was negligence for plaintiff to go in search of gas leak with a lighted taper is question for jury..... 162
- Person familiar with one side of street, who crosses to the other on dark night, with which side she is not familiar, and falls into hole in street, which is not protected, not necessarily guilty of negligence..... 215
- Under what circumstances will binding instructions be refused defendant, a gas company, for injury resulting from an explosion in a cellar into which gas from one of its pipes, under an adjacent street, was escaping..... 288
- Under what circumstances person who is injured by falling off country bridge at night time, which has no guard rails, will be guilty of contributory negligence..... 308
- Act of May 11, 1888, requiring person in charge of erection of building to have scaffolding above third floor, does not make them liable in damages to person injured for failure to comply with act..... 365
- In action for personal injuries, where facts are not clear and simple, and where existence of contributory negligence depends upon inference to be drawn from evidence, question must go to jury. Whether plaintiff has been careful in use of way of departure from railroad station, and whether defendant company has provided safe mode of passage is for jury..... 388
- What action of crew of train passing public crossing will render railroad liable for injury..... 394
- Under what circumstances will question be for jury, of whether plaintiff, who was injured by being thrown by his horse under train from the public road which ran parallel with railroad, used reasonable prudence in driving upon that part of road from which he was thrown upon tracks..... 417
- NEGOTIABLE INSTRUMENTS.** Owner of check uses due diligence in its collection by depositing it in a bank after three o'clock, it having been received by him after three, which bank sends it next day to the bank through which it clears and which in time presented it for payment next day..... 33
- In action by holder of note for value, and in good faith against accommodation indorser, latter cannot defend on ground that note was stolen from him by person who sold it to plaintiff. (O. C.)..... 147
- NEW TRIAL.** When new trial will be granted when court misconstrues whether contract on question of whether specified sum was penalty or liquidated damages for delay. (C. P.)..... 56
- Remarks of counsel, when ground for. (Q. S.)..... 153
- What conduct of plaintiff's agent, toward jurors after verdict has been rendered, will justify granting new trial. (C. P.)..... 424
- NOTICE OF CLAIM OF TITLE. See Ejectment.**
- NUISANCE.** Shanty boat located on bank of navigable river, below high water mark and used as residence, is nuisance. (C. P.)..... 390
- Municipal authorities can remove such a boat on refusal of owners to do it..... 1b
- NURSING, SUIT FOR SERVICES. See Master and Servant.**

OIL, ACTION FOR. Claimant of oil cannot sue pipe line for it, or for value thereof, if it has been received from well of third person who is in possession of well..... 52

OIL AND GAS CONTRACT. See Evidence.

OIL AND GAS. Implied condition in every oil lease that lessee shall put down sufficient number of wells to secure the oil for common advantage of lessor and lessee..... 21

Duty of lessee in oil lease to so conduct his efforts as to bring oil to the surface for benefit of both lessor and lessee..... 1b

Lessee, who has two adjoining oil leases, will be compelled to operate wells on one of the leases if it appear that he is operating wells on the other lease so as to draw the oil from under land covered by first lease to the injury of lessor..... 1b

In oil lease from tenant for life and remaindermen, where certain per cent. of oil obtained is to be paid as rent, life tenants entitled for life to interest on rent and principal to the remaindermen..... 41

Life tenant of land upon which no wells for oil or gas have been opened cannot operate or lease land for oil or gas purposes, and her lessee for such purposes are trespassers..... 214

As life tenant has no right to make lease of land, which has not been drilled for oil and gas purposes, lessee is not bound by covenants in lease... 1b

What terms and conditions of oil lease will be construed to be for benefit of lessor..... 421

What entry be lessor on leased premises will not amount to eviction..... 1b

What will be considered constructive eviction on part of lessor..... 1b

ORPHANS' COURT. Allowance for support of minor by petitioner will not be sustained if guardian of minor was compelled to expend money in employing counsel to collect from petitioner, as administrator, minor's distributive share. (O. C.)..... 48

Under 50th section of Act of 1834 executor cannot petition Orphans' Court for rule to show cause why owner of land, who purchased from devisee under will, should not pay executor certain sum charged on land by will..... 244

ORPHANS' COURT—PRACTICE. For what bill of review will be granted. (O. C.)..... 435

ORPHANS' COURT SALE. See Administrators and Executors.

PARTITION. Under what circumstances will partition by bill in equity lie of land, which by terms of will was to be sold by executors upon agreement of the widow and children when no agreement has been reached and no sale made... 213

PARTNERSHIP. Two partners after dissolution, in order to realize on a debt bought a farm from debtor's wife, each taking title to undivided one-half. *Held*, one partner could not buy half of other partner for purpose of selling whole at profit to himself at expense of partner..... 75

Only unambiguous and clear words in will make general estate of deceased partner liable for debts contracted after his death. (O. C.)..... 210

Surviving partner in mercantile business can make small purchases to enable him to close out business..... 1b

Such purchases entitled to preference in distribution, and deceased partner's estate liable therefor. 1b

What action on part of one member of partnership in selling partnership property and fraudulently concealing price from other partners, will render partner liable, together with his agent, who participated in the fraud, to account for profits to other partners..... 451

PARTY WALLS. Under Act of April 10, 1849, original owner of party wall, who stipulates in conveying lots on each side thereof, that grantees should not make use of party wall without paying stipulated price therefor, cannot maintain action for use thereof if he has conveyed both lots, but such action is in grantees..... 375

Right of first builder to party wall passes to grantee of land unless otherwise provided..... 1b

PHYSICIANS. See Negligence.

PRACTICE. Where plaintiff does not file declaration for fifteen years after filing *procipe*, and there is rule of court to the effect that nonsuit may be entered if no declaration is filed within three months, nonsuit is properly entered..... 49

Statement of claim must be filed before return-day to entitle plaintiff to judgment for want of appearance. (C. P.)..... 320

PRACTICE—Continued.

Unless suit brought and statement served fifteen days before return-day plaintiff cannot take judgment for want of sufficient affidavit of defense, unless defendant has fifteen days' notice..... 320

Appeal from assessment of four of six lots on same street, assessed for same improvement, does not stop collection of assessment from other two..... 346

PRACTICE, Making a Record for an Appellate Court. Article on..... 201

PRESUMPTION. Fact that property was bought with partnership funds rebuts presumption that partners are tenants in common, arising from fact that deed conveys to them individually..... 231

Fact of finding man dead on public road upon which he was driving, and which was in bad repair, does not raise presumption of negligence on part of township resulting from bad condition of road..... 399

PROBABLE CAUSE. See False Arrest.

PROXIMATE CAUSE. Under what circumstances will the leaving open of the door of freight car through which sparks from a fire upon property adjoining the railroad entered and set fire to the contents, be considered the proximate cause of the loss..... 83

QUESTION FOR THE JURY. Under what circumstances will it be considered proper to refuse binding instructions for the defendant in action of *assumpsit* to recover balance from broker alleged to be due on stock transaction, where it appears that plaintiff and his son, whose name was the same, kept separate accounts with defendant,—plaintiff for stock transactions and son for wheat transactions,—who also testify that their accounts were each opened with their own money, but defendant contended that both transactions were for benefit of son, and consequently sold out plaintiff's stock to make good the son's losses..... 293

QUESTION OF LAW RESERVED. See Practice.

Question of law reserved, proper form of. (C. P.)... 350

RAILROADS. See Street Railways.

The Acts of 1849 and 1856, relating to railroads, does not provide of what the water tanks shall be made, and this must be left to the reasonable discretion of the railroads. (C. P.)..... 17

Under Act of April 9, 1856, railroad in constructing water station may include the taking of water and water rights. (C. P.)..... 18

Since Act of February 17, 1871, question of whether lateral railroad is a necessity, and amount of damages to be assessed for land taken is for jury. (C. P.)..... 227

Necessity of road must be determined before bond can be given by company desiring to build..... 1b

RECEIVERS, ACTIONS AGAINST. Under what circumstances persons selling goods to receiver of corporation, stand on same footing as other creditors and cannot recover back goods. (C. P.)..... 395

RECEIVERS' CERTIFICATES. Under what circumstances receivers' certificates issued to take up others, which are a first lien, lose the preference given to those first issued..... 395

Receiver's certificates issued by order of court, which are not made first lien, are not entitled to preference..... 1b

RENT. Where defendant leases land over part of which railroad has bridge, cannot defend in action for rent on ground that railroad used part of leased land in repairing its bridge..... 257

RENT, DISTRESS FOR. If person distrains for rent under statute, failure to make appraisal renders lessor trespasser *ab initio*..... 126

REQUISITION, EXPENSES OF. Under Act of March 31, 1880, person authorized by requisition to apprehend person in another State, is entitled to pay for reasonable services and expenses. (C. P.)..... 412

SALE, CONTRACT OF. Vendee of goods accidentally destroyed while in custody of vendor, is liable for price thereof if he permitted them to remain with vendor after time mutually agreed upon for their delivery. (Super. Ct.)..... 94

Setting aside of certain goods taken out of large quantity by vendee constitutes delivery..... 1b

SALARIES. Act of June 18, 1891, relating to salary of assistant district attorney, does not apply to Allegheny county. (C. P.)..... 109

SEPARATE USE TRUST. See Wills.

- SET-OFF.** One judgment cannot be set off against another if the rights of third persons are affected. 9
- SCHOOLS AND SCHOOL LAW.** Under Act of June 6, 1893, court has power to determine whether school directors have exercised sound discretion in providing suitable building accommodations for all school children of district. 276
- Decree of Common Pleas Court reviewing discretion of school directors as to providing school buildings will be disturbed for manifest error only. 1b
- Notice to school directors of time and place of hearing of petition for appointment of inspector not required by Act of June 6, 1893. 279
- Lawyer may be appointed inspector. 1b
- Under what state of facts will parochial school be considered public charity and exempt from taxation under Act of May 14, 1874. (C. P.) 330
- What buildings annexed to such school will be exempt from taxation. 1b
- Act of July 2, 1895, relative to the admission and instruction of children of soldiers of war of rebellion in schools outside district in which parent's reside, is unconstitutional. (C. P.) 441
- SHANTY BOAT.** See Nuisance.
- STENOGRAPHER'S NOTES.** When official stenographer's notes, taken at former trial, not admissible in evidence under Act of 1887. 386
- Paper signed by stenographer of court below, stating that certain instructions contained in certified record had been incorrectly transcribed by him, will not be considered in Supreme Court. 402
- STOCK TRANSFERS.** Stock certificate "transferable personally or by attorney on books of company" does not estop corporation for asserting lien on stock against transferees thereof. 115
- Act of April 20, 1874, par. 7, relating to transfer of stock certificates, does not prohibit transfer of stock, though transferee be indebted to corporation otherwise than that growing out of original subscription or subsequent calls. 1b
- STREET IMPROVEMENTS.** See Practice.
- Borough officials, after proper notice of proceedings before viewers to assess damages, cannot have case sent back to viewers or new viewers appointed because former failed to be present. 124
- Under Act of June 13, 1874, appeal must be taken within thirty days from filing of viewers' report. That part of Act of April 1, 1871, relating to change of grade in street in city of Allegheny, unconstitutional. 159
- Change of grade of street and assessment of damages, under Act of 1871, in city of Allegheny, which is unconstitutional, does not prevent assessment of damages under Act of 1891. 1b
- Testimony as to what proper cost of street pavement should be in appeal from finding of board of viewers, must be confined to what that cost would justly have been at time pavement was laid. 255
- Findings of viewers should not be disturbed except for clear error. 1b
- Assessments for construction of sewer cannot be taxed upon non-abutting property owners. 317
- Under what circumstances property owners can appeal from board of viewers for costs of laying sewer where no damages are awarded. 318, 320
- Act of May 16, 1891, relating to street improvements, supersede all other local laws except so far as may be necessary to complete improvements then under way, or to collect assessments made in pursuance of local laws for improvement before passage of general act. (C. P.) 378
- STREET RAILWAYS.** Under what conditions street railway may build and operate its line through streets of borough or township. 134
- Steam railway can only question rights of street railway running through borough or township when it can show special damage or interest different from that of the public. 1b
- Steam railway can insist that street railway's bridge over its road be made safe. 1b
- Under what circumstances will court of equity refuse to enjoin laying of street car tracks on street around curve of plaintiff's property. (C. P.) 141
- SUBROGATION.** Guardian who advances balance found on settlement of his account, is entitled to subrogation to remedies of late ward as against his agent who had wrongfully retained possession of the assets represented by the decree. (O. C.) 414
- SUMMONS.** What service of summons upon defendant, who does not appear, will be held sufficient to sustain judgment against him upon transcript filed in court. (C. P.) 369
- SUMMONS—Continued.**
- In suit against corporation before justice return of summons, showing service "at the office in presence of A.," without it appearing that latter was representative of corporation, is defective. (C. P.) 233
- In such case, insufficiency of service, not cured by record of justice, which shows appearance of A., but no authority for him to appear for defendant. 1b
- When service of summons on agent of company, having no regular place of business in this State, will be sustained. (C. P.) 338
- Burden of proof on defendant to show return of service of writ was false. 1b
- SUPERSEDEAS.** See Appeals.
- SUPREME COURT.** Rule regarding certificate of amount in controversy. 104
- SURETY.** See Estoppel—Mechanics' Liens.
- Unless surety pays debt in full he is not entitled to subrogation to any part of the rights of creditor. 85
- TAXES.** County taxes not made lien on real estate under Act of May 22, 1895. (C. P.) 103, 1b, 111, 180
- TENANT BY CURTESY.** See Husband and Wife.
- TENANTS IN COMMON.** See Widows.
- Tenant in common mining coal in common property is liable to co-tenants for interest if he retains for unreasonable time portion of proceeds to which other tenant is entitled. 451
- TESTAMENTARY CAPACITY.** See Wills.
- Want of mental capacity to digest all parts of contract does not necessarily render person incapable of testamentary capacity. (O. C.) 237
- TRANSCRIPT OF ALDERMAN.** See Judgment—Summons.
- TRUSTS AND TRUSTEES.** What are distinguishing features of active trust. (O. C.) 181
- Under what circumstances persons lending money to trustees upon security of trust estate become trustees *ex maleficio*. (O. C.) 156
- Where possession in trustee is essential, active trust is created. (O. C.) 228
- What is the extent of jurisdiction of Common Pleas over trustee in trust mortgage set forth. (C. P.) 396
- USE PLAINTIFF.** Defendant in suit on an account cannot attack title of use plaintiff where it appears that legal plaintiff assigned account to receiver who had power to complete outstanding contracts, to pay expenses of business and to indorse for purpose of business paper coming into his hands, and receiver assigned to use plaintiff, and fact that sum sued for has been attacked in hands of legal plaintiff and receiver by Ohio court is no defense if defendant was not served with attachment. 284
- VIEWERS, REPORT OF.** See Street Improvements.
- VENUE, CHANGE OF.** After change of venue has been granted under Act of March 22, 1856, petition for a change of venue under Act of March 30, 1875, presented on the day set for trial will be refused. 251
- Mere personal opinion of trial judge toward defendant's newspaper, without any expression of opinion regarding case on trial, not sufficient to sustain plea to jurisdiction of court. 1b
- VOLUNTARY ASSOCIATION.** Under what circumstances will majority of members of one lodge of voluntary association, which is subordinate to grand lodge of that association, upon attaching themselves to another lodge be restrained from taking possession of personal effects of lodge to exclusion of minority members who remain true to original lodge. (C. P.) 386
- WAGES.** A judgment obtained by a debtor against his creditor under the provisions of the Act of May 23, 1887, relating to the assignment of wage claims to persons outside the State for the purpose of collection, cannot be attached in execution by the wife of the creditor to whom the judgment has been assigned. 11
- Act of April 20, 1876, relating to bail absolute in appeals from judgment for wages before alderman, covers cases for judgments for wages recovered after jurisdiction was raised to \$300. (C. P.) 391
- Act of April 20, 1876, is class legislation and in conflict with State Constitution. 1b
- WAIVER OF NOTICE OF ASSIGNMENT.** See Life Insurance.
- WARRANTY.** Statement that rails shipped defendant are "first class A 1" is warranty for their quality. 138

WATER COMPANIES. Borough permitting company incorporated under Act of April 23, 1874, to supply water to public, cannot subsequently contract and operate water works.....		102
Courts cannot, under Act of April 23, 1894, prefer in first instance general tariff of water rates and compel companies to furnish water at such rates.....		285
What will be considered reasonable system of water rates.....		1b
What companies after once locating pipe-lines will be enjoined from laying out over same land new or additional route for pipes. (C. P.).....		406
WATER RIGHTS. Right to spring water flowing from owner of land, whose property is condemned by plank-road company, is entitled to water from spring on embankment by side of road opened by cut made in opening the road.....		105
WIDOW'S ESTATE. Widow of intestate who leaves issue is entitled to one-third of value of coal in place from purchasers of coal lands from heirs of intestate.....		454
WILLS. See Testamentary Capacity.		
Petition to admit subsequent will to probate implies revocation of probate of prior will. (O. C.)....		80
Paper reading, "In case one of us should die our money shall fall to one living," is double will revocable by both.....		1b
Sole legatee in will who surrenders will to sole legatee under former will, upon agreement that latter would give his estate to him upon his death, cannot probate lost will upon failure of legatee, to whom he gave it, to bequeath it to him, but must proceed against his estate.....		1b
Where one part of residuary estate is for widow for life, and then payment of special legacy thereout, and other part is presently payable to next of kin, failure of widow to take does not make special legacy payable out of latter fund. (O. C.).....		122
Testator devised property to wife for life, and on her death to children, A., B. and C. If A. should die leaving heirs their share to be held in trust until they reached twenty-one years, and if they all die before reaching twenty-one then A.'s share goes to B. and C. <i>Held</i> , A. on surviving widow takes a fee-simple. (C. P.).....		176
What testimony on the question of undue influence produced before the Orphans' Court will be		
WILLS—Continued.		
sufficient to justify the awarding of an issue <i>deviseavit vel non</i>		223
Testator gave his son R. and daughter C. farm and all farming utensils, in equal shares, and directed "If my daughter C. dies unmarried, her brother R. shall have what remains of her share of my property, and if she marries, then her brother R. shall pay her \$1,000 as her share of my estate." <i>Held</i> , that quoted words refer to marrying or dying during testator's lifetime.....		299
Testator gave his estate to his wife absolutely, but followed this with limitation of the gift as to two shares of stock to its income for life and gift over to daughter, and directed that remainder of estate, after payment of wife's debts and funeral expenses, be divided between his four children. <i>Held</i> , widow took stock for life and balance of estate absolutely. (O. C.).....		341
What words in a will, which devises certain land to his daughters in fee with devises over in case any of his children shall die without leaving lawful issue, indicate the actual intent of testator to refer to death of testator in testator's lifetime.....		343
What words in will sufficient to create separate use trust of personal property.....		1b
In issue <i>deviseavit vel non</i> , what evidence will be considered insufficient to justify jury in finding that testator did not understand the writing or that he did not intend it to be his will.....		347
Will of married woman, without witnesses, is not validated by Act of June 3, 1837, passed after making of will, but before her death.....		384
What writing in nature of will, but not attested by witnesses, will be considered sufficient evidence of valid trust to entitle beneficiaries to take, though gift to charities therein named are avoided by Act of April 24, 1855. (O. C.).....		415
WITNESS. See Evidence.		
Reputation of witness for truth and veracity can only be attacked as to the time his testimony is given.....		336
Husband competent witness to prove that property conveyed to his wife during coverture was purchased with her own money.....		186
When opinion of witnesses in action for injury resulting in death at public railway crossing, admissible as to whether deceased stopped, looked and listened at proper place.....		394

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Supreme Court, Penn'a.

RICHARDS v. WILLARD.

In an action for injuries caused by malpractice, where the question depends upon expert testimony, the jury should be instructed by the court very carefully as to the exact question involved, the manner in which it arose, the conflict in the testimony and the reliability and competency of the witnesses and the value of the testimony as determined by the opportunities of the witness for examination.

The plaintiff in an action for malpractice left the hospital in which he was being treated by the defendant, without the consent of the defendant, and travelled a long distance without further medical treatment. The testimony was uncontradicted that this contributed largely to the plaintiff's injury and might be the sole cause of it. *Held*, that the injury caused by the alleged malpractice and by this neglect could not be separated, and the plaintiff cannot recover.

In an action for damages for malpractice, where the question depends on whether there was a fracture of the bones of the leg, two physicians who examined and attended the plaintiff some days after the accident, testify there was a fracture. Three physicians who saw and treated him just after the accident, testify there was no fracture, and they are sustained by a number of experienced physicians who examined him at the trial. The indications as testified to by the two physicians for the plaintiff might be sustained on another theory consistent with there not being a fracture. *Held*, that binding instructions should be given for the defendant.

Appeal of Dr. L. H. Willard, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action for malpractice brought by John Richards, who was a free patient at the Homeopathic Hospital in this city.

Verdict for plaintiff for \$12,000 which the court subsequently reduced to \$4,000; whereupon defendant appealed.

For appellant, *W. B. Rodgers* and *J. H. Beal*.
Contra, *Wm. M. Hall, Jr.*

Opinion by GREEN, J. Filed July 15, 1896.

This is a case of extraordinary and unusual character. The plaintiff claims damages against the defendant for negligent surgical treatment for an injury to his leg. He alleges that he had sustained a fracture of both bones of his leg at a short distance above the ankle joint, and was treated not for a fracture but for a sprain, and

was thereby greatly injured. It is not claimed that the treatment he received was improper treatment for a sprain, but that it was entirely incorrect and inadequate treatment for a fracture. The defendant denies most positively that there was a fracture, and his testimony is supported by that of two other surgeons who saw and examined the plaintiff's leg on the day, and immediately after the injury was sustained, and also a number of surgeons who examined it at subsequent times and testified that in their opinion there never was a fracture. If there was no fracture the plaintiff has no case. If the subsequent condition of suffering and illness of the plaintiff was produced in whole or in part by acts of contributory negligence on his part, he could not recover, and on both these points the court so instructed the jury.

The great controversy in the cause turned upon these two points, and especially upon the question whether or not there ever was a fracture. The singularity of the case arises upon the character of the testimony and the conflict developed as to the great leading fact. The alleged fracture was declared by the plaintiff's surgical witnesses to be a compound fracture of both bones of the leg, the tibia and fibula, at a point about one and a half to two inches above the ankle joint. The fracture of the tibia, or shin bone, was by far the most important. One surgical witness for the plaintiff, Dr. Enfield, testified that he saw the plaintiff for the first time on December 23, 1890, at his office in Bedford, the accident having occurred on December 5th, at Allegheny City, and that he readily, and in a very few minutes, found a complete fracture of both bones. In the fracture of the tibia the lower portion of the bone projected up over the upper portion about half an inch, and made a distinct ridge easily perceived by the eye and of course by the touch. This was eighteen days after the accident. One other surgical witness, Dr. Calhoun, was called in and saw the leg on January 23, 1891. He also testifies that he inserted his finger in a hole in the leg which had been produced by suppuration and found the ends of broken bones overriding each other, and testified that there was a fracture of the tibia. He knew nothing about the fibula.

The foregoing was the whole of the original surgical testimony given by the plaintiff to establish the fact of fracture. Two other surgeons were examined by the plaintiff but neither of them saw the leg until long after the accident, and they only testified as to general matters connected with, or relating to fractures and treatment. Their testimony and that of Drs. Enfield and Calhoun constituted the whole of the plaintiff's surgical testimony.

All of them, and all of the other surgical testimony in the case, established that fractures of the tibia are most easily discovered, generally they are directly visible to the eye without the help of manipulation. But by means of slight manipulation such fractures are detected without the slightest difficulty. The reason is that the tibia has very slight covering over it in the way of muscles, tissue or flesh. The bone can be readily felt by the fingers over its whole length and especially near the ankle.

One of the surgeons, Dr. Hartmeyer, testifying upon this subject, and explaining to the jury why it would be easy to detect such a fracture, said: "Why simply because the deformity in a fracture of that kind would be so great that to the naked eye of an experienced man the fact would reveal itself at once that the fracture existed and by manipulating that leg I dare say that it would be impossible for any man under the sun that knows anything about anatomy in the first place and surgery in the second place to make that mistake; it would be an utter impossibility."

Dr. Enfield, the plaintiff's principal witness, was asked, "Q. Now, will you state what in your experience and from your knowledge of medical science is true as to this point of the anatomy, the leg, in reference to the discovery of a fracture at this point? A. They can be discovered more readily than perhaps any other portion of the body. Q. Why is that? A. That is owing to the thin covering of the muscles over the parts and owing to the fact that there is little swelling takes place in a fracture at this point. The tissues are compact and not so full of cells, and you can usually by the guide of the bone, especially the sharp spine that is along the tibia, as a guide, you can usually discover the fracture in that bone, and there is almost always deformity at this point." There was abundant other testimony to the same effect.

Now bearing in mind that the establishment of a fracture was an essential and fundamental condition of the plaintiff's right of recovery, it becomes necessary to recur somewhat to the testimony of the defendant. The accident hap-

pened at about noon on the 5th of December, 1890. The first surgeon who was called to see the plaintiff after the injury was Dr. McClelland. He said he made a careful examination of the leg in the usual manner "by manipulating and the ordinary means employed to make an examination by inspection and manipulation," and found that the patient was badly bruised but there were no bones broken. Being asked, "Q. Was there any fracture, doctor," he replied, "There was no fracture." He advised that the plaintiff be sent to the hospital, which was accordingly done. Dr. McClelland was recalled later, and said he had examined the plaintiff at the time of the second trial which was in June, 1893, and had not seen him from the time of his first examination until then. He repeated that there was no fracture at the first examination, and he was then asked a long question which described the fracture as testified to by Drs. Enfield and Calhoun, and was asked, "Q. Was there ever such a fracture as that on this man's leg? A. I would say not. Q. Will you tell the jury why you say that? A. I say that because there was no evidence of fracture when I saw him first and I found no evidence of fracture when I examined him last."

The next surgeon who saw the plaintiff after the accident was Dr. Marshall, the resident surgeon at the hospital. He went with the ambulance and assisted to remove the patient to the hospital, first making an examination at the place where he found him. After he reached the hospital the patient was undressed and put to bed, and he then proceeded to make a full and thorough examination of the leg, by all the usual and well-known methods practiced by all surgeons in such cases. He compared the two legs for shortness, manipulated the limb with his hands, following the bones as far as he could. He then examined for crepitus and then tried it for mobility, by taking hold of it by the heel and twisting it, holding the leg fixed. He was unable to find any evidence of fracture and diagnosed the case as one of sprain and concussion and treated it accordingly with hot compresses and hamamelis extract, to allay pain and reduce swelling and inflammation. About four o'clock the same afternoon Dr. Willard came in and he also examined the patient, going over all the methods usual in such cases. No evidence of fracture was discovered and the treatment for subduing inflammation was continued. The next day Dr. Willard called again and made another and fuller examination, trying the leg in every way by comparison for shortness, for crepitus and mo-

bility, and by tracing the spine of the tibia with his finger to see if any evidence of fracture could be discovered. No fracture was discovered or any evidence of any, and the treatment was continued for sprain and concussion.

Dr. Willard himself describes the method of his examination. He says: "The next examination was made, I think, a day or so afterwards, and then the examination was more thorough. I would take the leg in both hands, one hand at the heel and the other at the ankle joint and make the ordinary manipulations." "Q. Now, what were those? A. Well it was from one side to the other, up and down; those were the ordinary manipulations, in the first place to find out if there was any crepitation, and in the second place by putting it side by side we would see if there was a fracture; the portion of the bone perhaps could be felt by the finger. These are the manipulations; taking this portion of the heel in my hand and working it backwards and forwards in that manner and then working it up and down so," (explaining it to the jury). He had previously stated in the other part of his examination, thus: "I then examined him by running my hands over the spine of the tibia, down the course of the fibula, didn't make much motion, compared one leg with the other to see if there was any shortening; there was no apparent shortening at all." He made several of these examinations while the patient was at the hospital, four or five in all. He was asked, "Q. Well, doctor, what conclusion did you arrive at as regards this case? A. That there was no fracture.

Now there was not a particle of testimony in the case that this was not the usual, correct, proper and sufficient method of examination in ordinary use by all surgeons, and so far as this subject is concerned there was no testimony to the effect that this was incorrect practice in any degree. Three skilled, competent and careful surgeons, in full practice, testified, after having seen and carefully examined the plaintiff immediately after the accident and on succeeding days, that there was no fracture of the leg. The treatment given to him was the proper and usual treatment if there was no fracture, and there was nothing in the testimony upon which a right of recovery could be based, except that there was a fracture in fact, which was not discovered by any one of these three surgeons, but was discovered by two other surgeons, the first of whom saw the patient for the first time eighteen days after the accident, and the other of whom first saw him forty-eight days after that event.

On behalf of the defendant six other surgeons

were examined, several of them of the largest and most extensive experience, thoroughly competent in every way, all of whom examined the plaintiff's leg at different times, and every one of whom testified that in his opinion the leg never was fractured, giving his reasons with much detail. Dr. Hartmeyer, one of these witnesses, was asked whether, judging from his examination of the leg, there had ever been a fracture, and he answered as follows: "A. From the evidence I find after careful examination during the last trial, I would say it never existed. Q. And, doctor, to what do you attribute the present condition of Mr. Richards' limb? A. The present condition as I find the evidence there now, I would attribute to a high degree of inflammation to caries, and a part of it due to the surgical interference subsequent to that; operative procedure in other words. Q. Doctor, referring to the spine of the tibia on Mr. Richards' limb, I wish you would state whether you examined that closely? A. I did. If there was a fracture of the tibia you might state whether it would be shown upon that bone? A. If there was a fracture as described it most undoubtedly would be shown; it couldn't fail to be shown. Q. And did you make a special examination of the spine of the tibia with reference to that? A. I did. Q. Is there any evidence, doctor, that the spine of that tibia or any portion of it at a point about an inch and a half above the ankle joint was ever cut off? A. No, sir; I found it intact."

Dr. Hamilton, a surgeon of forty years or more, and in the service of the Pennsylvania Railroad Company for over thirty years, and who had seen six or seven thousand cases of accidents to their men, testified that he had examined the plaintiff's leg three times, and being asked whether there had been a fracture, said: "There is no evidence to me that he had a fracture at the time stated, nor of the kind referred to. I don't think he could have had such a fracture and have his limb present the appearance that it does at the present time. He then explained to the jury fully the reasons for his opinion, among others, that he had followed the spine of the tibia down to the ankle bone and it was perfect with any line of deformity, and that there was no evidence that the bone of the tibia had ever been thrown forward a quarter or a half of an inch. He also measured the legs and found them absolutely of the same length. Dr. Buchanan, a surgeon of large experience, testified that he had examined the plaintiff's leg carefully and found no evidence that there had ever been a fracture. He was asked, "Q. In your judgment was there ever such a

fracture as detailed by his surgeons in his case? A. No, sir." Dr. Murdock, a surgeon of more than forty years with an enormous experience in the hospitals, in the army all through the war, and in his private practice, testified that he had examined the plaintiff's leg very carefully by feeling it, measuring it and comparing it with the other leg, and the fracture as described by the plaintiff's surgeons having been explained to him, said: "There is no evidence of there ever having been such a fracture." He said he measured the leg and found no shortening in it, that he had run his finger down along the spine of the tibia and found no prominence or depression at the place of the alleged fracture. Dr. King, a surgeon of thirty years' experience in the army and in the hospitals and in his private practice, testified and gave the results of his examination of the plaintiff's leg. He was asked, "Q. Well, doctor, from your examination of that wound, what is your opinion as to whether it ever was fractured or not, as described? A. I don't believe it was ever fractured." He explained the reasons for his opinion very fully to the jury. Dr. Dickson, a surgeon of twenty-five years' practice, very largely in hospitals and on railroads, said he had examined the plaintiff's leg, and was asked, "Q. And I wish you would state whether there was any fracture of the tibia and fibula as stated? A. I can see no evidence of that limb having been fractured at any time."

In addition to all this Dr. La Place, who had treated the patient's leg after Drs. Enfield and Calhoun were unable to help him, said the plaintiff had tuberculosis of the tibia, and that he treated him successfully for that disease. He also said he had found no evidence that there had been a fracture of the limb. This witness had been examined for the plaintiff, but as his testimony was unfavorable he was examined by the defendant on the second trial. He was asked, "Q. Did I understand that there was no evidence of a fracture? A. None. If there had been I would have seen it if it could be seen. Q. You don't know whether there was a fracture there or not? A. I can't say with absolute certainty, but I say this, that if there had been a fracture, it surely would have shown." A vast amount of confirmatory evidence was given in the course of the very long examination of the surgical witnesses, but it is too cumbersome to repeat in detail.

It is sufficient to say the great preponderance of the testimony, and that which was best informed and most reliable, tended to show that there never was a fracture of the limb such as was testified to by Drs. Enfield and Calhoun.

The most experienced of the surgeons easily accounted for the conditions to which those witnesses testified. Dr. Hamilton said: "I think the action of the patient in leaving the hospital was very injurious to his limb and was the cause of his condition at present." He was asked, Q. "Doctor, where there has been an injury to a leg in the region of the ankle, followed in a few days by severe inflammation extending in and around the joint which leg is examined by a surgeon at the end of three weeks from the accident, at which time the periosteum is carried away or roughened, and the bone roughened, and small pieces of bone having come away, would a physician be liable to be mistaken as to his diagnosis as to that being a case of fracture? A. He might be. He would be much more likely to be mistaken in his diagnosis than for the man to have gone home in that condition."

Dr. Murdock being asked whether he would not expect Drs. Enfield and Calhoun to be correct in their diagnosis, because they had examined the leg recently after the accident, replied: "I would expect them to be correct, and I would say that Dr. Enfield was correct if I hadn't examined this limb since and found that he was mistaken." He was asked, "Q. Well, suppose he got his finger into the wound, would the disease, tuberculosis, be likely to develop such a state of affairs as to lead him to suppose that there was a fracture when no fracture existed? A. Yes. Q. How would that be? A. Well, if he got his finger into a bone that was denuded of its periosteum and in which caries was going on, it would convey to his finger the same sensation, or very nearly the same sensation, that the ends of the bone would after having been rounded off by some little period of time; the same sensation would be conveyed to his finger, and also if a probe was put in, the same sensation would be conveyed to the end of the probe as in the case of fracture, and in the case of disease he wouldn't be able to tell the difference."

It must be remembered that Dr. Enfield never effected any cure of the plaintiff's limb, although he treated him for fracture. He continued to treat him for about a year. He said: "Well, he failed to improve after Dr. Calhoun and I had operated on him several times. I sent him to Philadelphia to the hospital, and gave him a letter to Dr. Pancoast, describing his case." It was at this time that he came under the treatment of Dr. La Place, who said that he discovered no evidence of fracture and treated him successfully for tuberculosis of the bone which was the disease which he said the plaintiff really had.

It must also be remembered that nobody has ever actually seen this alleged fracture. Neither Dr. Enfield nor Dr. Calhoun ever opened the leg and obtained an actual sight of it. So far as their testimony goes it was simply their opinion that there was a fracture. But Dr. La Place did open the leg down to the bone, and cut away a considerable quantity of decayed bone, and he said there was no evidence of fracture.

From the foregoing review of the testimony it is perfectly manifest that, so far as the plaintiff's theory of the case is concerned, his right of recovery depended upon whether there ever was an actual fracture of the leg. If there was not there is not a spark of testimony in the case upon which a recovery could be based. This being so the question arises, was the case sufficiently presented to the jury in the charge of the learned court below to enable them to appreciate the real matters of contention, and to intelligently decide the cause on its facts. In the statement of mere general principles, and of the duties of the parties respectively as to the burden of proof, and the rule as to contributory negligence, the charge was correct. But whether it was adequate in view of the precise character of the controversy and of the state of the testimony is another question. For instance, it is at once apparent that there was a very severe and fundamental contradiction in the testimony of the witnesses upon the vital question of fracture. Two surgical witnesses, testifying from actual examination, declared that there was an actual compound fracture, one of both bones of the leg and the other of the tibia. But on the other hand three surgical witnesses for the defendant, testifying also from an earlier and more complete and thorough examination, several times repeated, declared most positively and emphatically that there was no fracture whatever of either bone. Two experts who examined the leg a year or more later, testified that in their opinion there had been a fracture. But on the other hand nine experts, who also made examinations at the later date, declared that in their opinion there was not, and never had been, a fracture. This included the defendant and Dr. McClelland. When the testimony of the latter is examined critically, it is found to be much more full, more detailed, more specific, accompanied by more comprehensive reasoning, and to have been given, at least as to some of them, by gentlemen of far greater experience and means of observation, than was possessed by any of the plaintiff's experts.

And all this is followed by the testimony of one witness who was examined at first on behalf of the plaintiff and then for the defendant,

and who fully sustains the views of the defendant's experts, and testifies also that the plaintiff was affected by an independent disease, which accounts for all the symptoms and conditions.

Upon reading the charge in its entirety we find it does not contain a solitary reference to the fact that there was any contradiction in the testimony of the witnesses, or that there was any opposition of views among the surgical experts, nor any reference to the weight of the testimony on the two sides, nor to the character of it. There is no explanation of it as being expert testimony, nor as to what that kind of testimony is, or what effect may or should be given to it in determining the case. Nor is there any statement or explanation as to how the jury should reconcile the contradictions if they could, or if they could not then how they should regard it or act in relation to it. As the fate of the case in the hands of the jury absolutely depended upon the surgical testimony, there certainly should have been instructions upon that subject so as to enlighten the jury as to their duty in regard to it. Then, too, there should have been a presentation of just what the issue was, a statement of the matter of fact upon which the case turned, as, for instance, that the question of fact which they were to consider was whether there was a fracture of the leg in point of fact, or not, and also whether the treatment administered by the defendant to the plaintiff was in accordance with the usual and ordinary treatment practiced by competent surgeons in such cases. Instead of this the chief tenor of the charge was, that the jury should determine generally whether the defendant was negligent in his treatment of the case, and while they were told they should determine whether there was a fracture, there was no explanation as to how that question arose under the testimony and in what way they were to consider or apply the testimony. As the actual fracture was not seen, it was only a matter of opinion whether it existed at all, and the value of the particular testimony depended upon the competency of the witness to form a reliable opinion upon the extent and character of the examination he made, upon the reasons given by him in support of his opinion and upon their judgment as to the weight and character of the testimony submitted on both sides in support of the respective contentions. All this should have been explained to the jury with suitable comments and instructions sufficient at least to get them on the right track of inquiry and deliberation. The case is peculiar. It is nothing like cases in which mere facts, or events of actual occurrence,

are described, or even the conduct and declarations of parties, but where the opinions of witnesses as to whether a given condition or state of facts exists are very largely, almost entirely, to be depended upon. In the case of *Tietz v. Philadelphia Traction Co.*, 189 Pa. 516, we held that a charge is inadequate which does not fairly present the whole case to the jury with a clear statement of the rules of law applicable to the questions involved. We think the charge was not an adequate presentation of the case to the jury and therefore sustain the nineteenth assignment of error. We think that the eighteenth assignment is also sustained. The part of the charge complained of here was an attempt to distinguish between the injury to the plaintiff, supposing he was negligently treated up to the time of his leaving the hospital, and the injury which resulted from his own negligence in leaving the hospital when he did, and his subsequently going to Wilkinsburg, remaining there five days without any treatment, and then travelling to Bedford, upwards of two hundred miles distant, for further treatment. That the plaintiff's act of leaving the hospital at the time he did and in the condition he was then, was an act of negligence on his part, cannot be questioned. How his subsequent conduct in travelling to Wilkinsburg and Bedford, if it resulted in the severe consequences that followed, was still more negligent according to the universal testimony of all the surgeons. Whether he would have been cured if he had remained at the hospital a longer time, as Dr. Marshall testified he would have been, cannot now be known because of his own voluntary act of leaving. It is impossible, therefore, to distinguish between the consequences which resulted from his ultimate act of leaving, and those which might have resulted if he had remained. He might have been cured if he had remained, or he might not, and it is not possible now to determine that question. But that impossibility results from his own action, and, therefore, no distinction can be made, as the source of a right of action, between the consequences which might have happened had he remained and the consequences which did happen after his departure. The idea of the charge was that if the plaintiff was negligent after leaving, and therefore could not recover, he still could recover for his suffering and pain while he was at the hospital. The answer to that is that it is not possible to determine that question, because, notwithstanding his subsequent sufferings, he might have recovered if he had remained. Now as to his subsequent contributory negligence the evidence is simply overwhelming and

is really not contradicted. Nearly all the surgeons were inquired of as to that, and they all concurred in their views. Even Dr. Enfield admitted that his travelling from the hospital to Wilkinsburg, and from there to Bedford, would have a very bad effect upon the patient. He was asked, after describing in the question the journey and the use of the leg, and the effect upon it, "Q. And the bones would cut through the flesh? A. Well, there was a hole there. Q. And wouldn't everything you saw in relation to that man's condition, as he came to you at Bedford, be explainable upon the idea that in this travelling and this motion the fragments had cut themselves through the skin. A. It might have produced the result, yes, sir. Q. And didn't you swear on the last trial of this case, 'The bones would cut as Richards was walking around and moving the limb the ends of the bones would cut as the muscles would contract, would draw apart and injure the soft parts, and open the skin to the outside by which germs would get in there and produce the condition I found him in? A. Yes, sir, that is correct. Q. Could fragments of the bone cut their way through the flesh in less than six days and hasten blood poisoning? A. Yes, sir. Q. Was the inflamed condition of the wound, the death of the bone and blood poisoning attributable to inflammation, caused by the moving of his limb about, laceration and abscesses and entrance of air to the injury? A. I think so, yes, sir.'"

Dr. Hartmeyer was asked a long question which described the movements of the plaintiff after leaving the hospital, as testified by himself, and at the conclusion he was asked, "Q. Did the action of the plaintiff contribute to produce his condition, as found by the doctors on his arrival at Bedford, and subsequent thereto? A. Well, most emphatically. If the man only had an injured joint, if he had an inflammatory action there at all, that would be, I consider, almost suicidal for a man to attempt anything of that kind, and if a fracture existed as a matter of course it would be a great deal worse. Q. What would you say as to the possibility of a man making a trip, and making the movements as I have described them? A. What do you calculate in the possibility, fracture as described in this case? Q. Yes. A. Well, I don't know anything about a man's physical endurance, but it doesn't seem possible to me that a human being would be able to undertake an action of that kind." The witness then explained at length the reasons why it could not be done.

Dr. Hamilton was asked the same long question as Dr. Hartmeyer and his answer was,

"Assuming that he had that condition of limb, and that he survived and did all these things it is a wonder he is alive." And again, "I think the action of the patient in leaving the hospital was very injurious to his limb and was the cause of his condition at present. I can't think otherwise." He further testified that he did not believe the plaintiff had any fracture because he could not possibly make such a journey if he had.

Dr. McClelland was asked the same question, concluding with the inquiry whether the journey contributed to the condition in which the plaintiff was when he reached Bedford, and his reply was, "My opinion would be that that would be entirely sufficient to account for the conditions that were found by Dr. Enfield at the end of the journey." He gave his reasons in detail, and further testified that he did not believe there was any fracture, because if there was the plaintiff could not have made such a journey. Dr. Buchanan was asked the same question and made a similar answer. Dr. Murdock was asked the same question, and in reply to that part of it which inquired, whether the action of the plaintiff contributed to produce the condition as found by Dr. Enfield, on the arrival of the plaintiff at Bedford, he answered: "It certainly would, sir." He also said there was no fracture because it would have been utterly impossible to have made the journey if the plaintiff had such a fracture at the time.

Dr. King also said in reply to the same question, "Yes, sir, the travel would do that." When asked to give his reasons he said: "Well, if he had a fracture without a splint on, the movement of the fracture caused by his traveling would so irritate the surrounding parts that inflammation would set up, and the probability is that owing to the proximity of the artery of the foot to these fragments, admitting that it was a fracture, the sharp edges of those fragments would probably cut off the artery or at least endanger it, at any rate it would get up such an inflammation that the foot would be gangrenous, it would produce gangrene of the foot provided he went through all you detailed." Dr. Dickson was asked the same question, concluding, "Did the action of the plaintiff, as stated, contribute to produce his condition as found by the doctor on his arrival at Bedford and subsequent thereto, assuming that the plaintiff did take this trip and was able to take it. A. Most undoubtedly the action of the party would be contributory to the condition."

Against all this formidable array of testimony there was not a single fact or opinion given in evidence. It was entirely uncontradicted. It

was manifestly impossible to set up a dividing line at the time the plaintiff left the hospital and attempt to separate those consequences of alleged negligent treatment of the defendant, which occurred prior to the plaintiff's leaving the hospital, from the ulterior consequences resulting from the plaintiff's contributory negligence after he left. It is impossible to set up a standard because it is impossible to know what would have been the result of the defendant's treatment if the plaintiff had remained at the hospital. The eighteenth assignment is sustained. The same reasoning applies to the fifteenth assignment, which is sustained. The sixteenth assignment is sustained because there is no evidence in the case which raises such a question. The fourteenth assignment is not sustained because the court was right in leaving the whole subject of what was said by the nurse to the jury. The nurse did not say explicitly that she told the plaintiff what reply the doctor had made as to the plaintiff's leaving the hospital when he did. She implied that she repeated the doctor's answer to the plaintiff, but she did not say so, and she was not asked the distinct question whether she did or not. As to the eleventh and thirteenth assignments it is not correct to argue that the plaintiff did not say that the doctor told him he could go home, because he did so testify. In his testimony, however, he did not say that the doctor told him he was cured, and in that respect the court was in error. Technically the court was in error in not stating the language of the witness with precision, but the more serious error was in not stating that the doctor denied having said in any manner, or in any words, that the plaintiff might leave. If there were no other reason for reversing we would not reverse on this ground alone, but, as there was technical error in what the court did say, we sustain these assignments. We do not sustain the second assignment because we think the answer of the court to the defendant's second point was substantially correct. We do not sustain the fourth assignment for the same reason. The matter of the fifth assignment was for the jury and therefore we cannot sustain it.

The defendant was not entitled to the affirmation of his sixth point, simply because Miss Blosser did not distinctly say that she repeated to the plaintiff the words of the defendant, to wit, that if he left the hospital he did so on his own responsibility. She was not asked the question distinctly whether she did or not. She did say that Dr. Willard said those words to her, but omitted to say that she repeated them to the plaintiff, and therefore the defendant's

sixth point could not be affirmed. The answer to the plaintiff's third point was of no consequence and moreover it was correct in law, and we cannot sustain the seventh assignment.

We think the plaintiff must be held responsible for the consequences of omitting to have medical treatment after he left the hospital, and for his travel to Wilksburg and Bedford. He did not advise with the defendant as to those matters, and he cannot hold the defendant responsible for his own voluntary acts in relation thereto. The answer to the plaintiff's fifth point, therefore, broadly affirming it as it stood, was erroneous, and hence we sustain the eighth assignment. The ninth and tenth assignments are not sustained, nor the twelfth because they are without merit. We think the portion of the charge complained of in the fifteenth assignment was not erroneous and therefore that assignment is not sustained. The seventeenth, twentieth, twenty-first, twenty-second and twenty-third assignments are not sustained. This disposes of all the assignments except the first and second.

After a painstaking, careful and minute study of the testimony in this case we are constrained to say that we regard the verdict of the jury as an outrage upon the administration of justice. There was no aspect of the testimony upon which it could be justified for any such amount, in any event. The plaintiff's case at the very best was of the most doubtful character. No verdict could be sustained at all except by striking down the testimony of ten entirely competent, disinterested witnesses, and accepting in its place the testimony of two witnesses who, whatever may be their personal merits, did not possess a tithe of the experience or means of observation enjoyed by the defendant's witnesses. As to three of these who personally saw, and carefully and frequently examined the plaintiff's leg immediately after the accident, when it could be best observed and considered, their testimony was absolute and positive that there was no fracture. They were all disinterested, entirely capable and, two of them at least, having a very large experience in this class of cases, and there is no reason discoverable in the testimony why their judgment and their evidence should be rejected in order to give place to the opposing testimony of two of the plaintiff's witnesses, one of whom did not see the patient until eighteen days after the accident, and the other not until forty-eight days had elapsed. In the meantime the plaintiff's conduct and action were such that even a fracture might have supervened on that account, but the most

experienced and competent of the defendant's witnesses were of opinion and so testified, that every condition of the leg as seen by Dr. Enfield at Bedford could easily be accounted for by the conduct of the plaintiff after he left the hospital.

On the subject of the plaintiff's contributory negligence in this regard there was no disputed testimony. It was established by all the evidence in the case, including that of the plaintiff's witness, Dr. Enfield. No opinion of any witness was given to the contrary and it was therefore an undisputed fact in the case. The learned court below very properly charged the jury that if the plaintiff's conduct was such after leaving the hospital, as to contribute to his condition, he could not recover for such consequence as happened after he left the hospital. But the evidence being entirely undisputed on that subject it must be regarded as establishing the fact of contributory negligence on the part of the plaintiff, and hence the first and third points of the defendant should have been affirmed, and the case withdrawn from the jury. The learned court showed its appreciation of the verdict by promptly striking down two-thirds of its amount, and might with still greater propriety have set the verdict aside altogether because of its being against the law and the evidence, and grossly excessive in amount.

It must not be overlooked that the medical and surgical service rendered by the defendant to the plaintiff was entirely gratuitous, the defendant receiving therefor no compensation of any kind. For many years Dr. Willard had been rendering such service to the hospital to which the plaintiff was brought after receiving his injury. He was one of the corps of physicians who from motives of benevolence and charity, contribute as they do in many other cities and towns, their time, their skill, their labor and their most valuable and humane service in relief of the sickness and suffering of their race. If such gentlemen are to be harassed with actions for damages when they do not happen to cure a patient and are to incur the hazard of having their estates swept away from them by the verdicts of irresponsible juries, who, caring nothing for law, nothing for evidence, nothing for justice, nothing for the plain teachings of common sense, choose to gratify their prejudices or their passions by plundering their fellow citizens in the forms of law, it may well be doubted whether our hospitals and other charitable institutions will be able to obtain the gratuitous and valuable service of these unselfish and charitable men. It is much more

than probable that if this plaintiff had been content to remain at the hospital a week or two longer he would have been cured of his hurt. Because he would not submit to such a reasonable detention he apparently brought upon himself all his subsequent sufferings. If he chooses to take such risks he must take the consequences himself.

The plain truth is that this plaintiff was probably afflicted with a tendency to tuberculosis, and when he received his injury that tendency became developed in the bones of his leg, and the disease called tuberculosis of the bone fastened upon him at the seat of the injury. Dr. La Place held to this theory and treated him for it with success. When this witness testified for the plaintiff, he was asked: "Q. Were there any broken bones in the limb; had there been a fracture? A. No evidence of it at the time of my examination." Continuing he said, "No particular bone was injured so far as was evidenced at the time of my examination; at that time I discovered a tuberculous inflammation involving the totality of the ankle joint extending into the substance of the lower end of the tibia and astragalus, disintegrating these and causing small pieces of bone to drop off from them with the rest of the products of inflammation." On the second trial he testified: "What we mean by tuberculosis arthetis is this. There is such a disease as tuberculosis, that is very widely disseminated in nature. Sometimes it develops in people's lungs and that is called consumption, and when it develops in a man's ankle it is called a tuberculosed arthetis. Now in this patient's case he had all the predisposition that a patient has to develop consumption, but inasmuch as he injured his ankle, that spot, that is the ankle, became the weakest spot in his body, and having the predisposition to develop tuberculosis he developed tuberculosis of the ankle joint. What I had there was tuberculous disease; there was no evidence of the fracture, there was no play of the bones at all, everything was united and solid and I didn't care whether he had a fracture or not; that didn't enter into the case. He had tuberculosis of the joint. He came there to be treated for tuberculosis of the joint, and that I did for him."

The foregoing theory is the only one that will satisfy all the facts in evidence.

Judgment reversed.

PATTERSON'S ESTATE.

Appeal of George F. Dawson *et al.*, petitioners, from the decree of the Orphans' Court of Alle-

gheny county, dismissing petition to compel executors to pay legacies.

(For statement and opinion of the court below, *per* HAWKINS, P. J., see 42 PITTSBURGH LEGAL JOURNAL, 239.)

For appellants, *Hill Burgwin.*

Contra, Watson & McCleave.

PER CURIAM. Filed January 8, 1896.

A careful examination of the record in this case with special reference to the specifications of error has satisfied us that neither of them should be sustained. All that need be said in vindication of the decree dismissing appellant's petition will be found in the clear and concise opinion of the learned president of the Orphans' Court. On it the decree is affirmed and appeal dismissed, with costs to be paid by appellants.

Court of Common Pleas, VENANGO COUNTY.

MATTHEWS v. RUSSELL.

A. gives B. a judgment note and B. gives A. a judgment note for a similar amount. A. gives B. the note in order to allow B. to raise some money. B. enters judgment and assigns it to C. A rule by A. to set off the judgment she holds against B. against the judgment assigned to C. herself is discharged.

One judgment cannot be set off against another, if the rights of third parties are thereby interfered with.

No. 5 Nov. T., 1892. Rule to set off one judgment against another.

PER CURIAM. Filed April 27, 1896.

The plaintiff in this case seeks to have the judgment at C. D. No. 54 November Term, 1890, wherein she is the defendant, and R. H. Russell (the defendant in this case) for use of Daniel Gross, is plaintiff, set off against her claim in this case. It appears from the testimony that the notes upon which these judgments were entered were given, one for the other, in exchange, without any other consideration, both bearing the same date and maturing at the same time. Judgment was entered on the note payable to Russell on the 10th day of December, 1890, and on the 18th of the same month the judgment was assigned for value to Daniel Gross, which assignment was placed on record July 22, 1892. On November 29, 1892, judgment was entered on the note, payable to Mrs. Matthews, being the same mentioned in the caption hereof. The testimony further indicates that Russell is insolvent. From the testimony adduced both for and against the rule, the conclusion is warranted that the note given by Mrs. Matthews to Russell was given with the under-

standing on her part that it was to be used by Russell as security for money which he desired to raise. The question presented is whether or not upon these facts the judgments can be set off one against the other.

This application is based on the assumption that both judgments are valid. It is to set off one valid judgment against another. The question of want of consideration for either, therefore, does not arise. The power to set off one judgment against another is one which has been long exercised by the courts, but it is permitted only where it will infringe on no other right of equal grade: *Ramsey's Appeal*, 2 Watts, 230. It does not depend upon the Act of 1836 extending equity jurisdiction to the law courts, but belongs to the inherent powers of such courts: *Horton and Heil v. Miller*, 44 Pa. 257. Its exercise is not demandable of right, and the justice and propriety of it must be determined by the facts and circumstances of each particular case. The practice is based upon the equitable principle that in conscience and in reality all that the party really owes is the difference between the two judgments, and that the courts will not suffer its process to be used for the collection of a debt when the creditor owes his debt or a like, greater or less sum, evidenced also by the records of the courts: *Windle v. Moore*, 10 W. N. C. 387. The general rule is that judgments may be set off against each other whenever executions issued upon them could be legally set off, one against the other, by the officer having them in his hands for service: *Am. & Eng. Ency. of Law*, vol. 22, p. 446.

Judged by the general rule cited the pending rule must be discharged, as an officer having in his hands executions upon both judgments, could not set off one against the other, as one of them would be in favor of Daniel Gross, a third party, not indebted to either of the others.

In *Ramsey's Appeal*, *supra*, it is stated by GIBSON, J., that set-off will not be enforced against an equitable assignee for value. The *bona fides* of Gross in making the purchase is not brought in question by anything alleged here in behalf of the rule. Therefore on the basis of the authority cited the rule must be discharged.

In *Filbert v. Hawk*, 8 W. 447, KENNEDY, J., criticises the language of GIBSON, J., in *Ramsey's Appeal*, in that the facts of the case are not fully recited in the opinion, and indicates that an equitable assignee for value is not protected unless his equities are prior in point of time to those of the party seeking the set-off. The same criticism is repeated (*Clement v.*

Phila., 187 Pa. 335) by McCOLLUM, J. Neither of these cases, however, were proceedings to set off one judgment against another, under the provisions of the common law, but the question raised in both were under the defalcation act. Besides, it is assumed in both cases, that in *Ramsey's Appeal*, the interest of the equitable assignee vested prior to the recovery of judgment by the defendant. Applying them to the case at bar, the rule, as laid down in the latter cases, the assignment to Gross was prior in point of time to the recovery of judgment by Mrs. Matthews. Gross, therefore, has a prior equity, and the rule must be discharged.

There is another reason for which it would appear that the rule should be discharged. Mrs. Matthews, as we have indicated the testimony discloses, gave to Russell her note with the knowledge that he intended to use it as security for the purpose of raising money, and with the intent on her part of aiding him in so doing. Russell having done so by selling the judgment entered thereon to Gross, with a guarantee of its payment, it would appear to be against equity for her now to say that it cannot be available to him as security. This is an equitable proceeding, not demandable of right, and the facts should disclose equity on the side of the party moving the court for a decree.

And now, April 27, 1896, the rule to show cause heretofore granted in this case, is, for the reasons given, discharged.

For plaintiff, *B. H. Osborne*,

For defendant, *J. H. Osmer & Son*.

THE OUTSIDE JUDGE.

You may sing of the Judge, Common Pleas Judge,
Or any Judge that you please;
I go for the Judge, the nice old Judge,
That knowingly takes his ease,
And looking wise from behind the bench,
At the rate of six thousand a year,
Cares not a hair in his sound old head,
Who goes to the front or rear.

Not his is the bone they are fighting for,
And why should the Judge sail in,
With nothing to gain, but a chance perhaps
To lose in strife and chagrin,
There may be a few, perhaps, who fall
To see it quite in this light;
But when the fur flies, I'd rather be
The outside Judge in the fight.

I know there are some—of Judges I speak—
That think it is quite the thing
To take the part of one in the fight,
And hop right into the ring;
But I care not a hair what any may say,
In regard to the wrong or the right,
My judgment goes, as well as my rhyme,
For the Judge that keeps out of the fight.

—Marshall Brown

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No. 2.

PITTSBURGH, PA., AUGUST 5, 1896.

Supreme Court, Penn'a.

STEEL, for use of STEEL, v. McKERRIHAN,
Defendant, and STEEL, Garnishee.

A creditor residing in Pennsylvania sent his claim to West Virginia for collection out of the wages of defendant, a railroad employee, who also resided in Pennsylvania, and obtained possession of such wages, whereupon the debtor, under Act May 23, 1887, securing to laborers the benefit of the exemption laws, recovered a judgment against the creditor for the amount of such wages. The creditor then transferred his claim to his wife, who obtained judgment upon it, and issued an attachment execution against the judgment recovered by the debtor. *Held*, that the judgment recovered by the debtor represented the wages collected in violation of the statute, and hence was not subject to execution in favor of the creditor's wife.

Appeal of Lizzie M. Steel, use plaintiff, from the order and decree of the Court of Common Pleas of Greene county, quashing an attachment execution upon a judgment entered on a judgment note in favor of Thomas J. Steel, and by him assigned to Lizzie M. Steel, against Thomas L. McKerrihan, Thomas J. Steel being summoned as garnishee.

The facts are stated in the opinion of the court below, quashing the attachment, as follows:

"On the 13th day of July, 1893, the said Thomas J. Steel and Thomas L. McKerrihan were citizens and residents of the Commonwealth of Pennsylvania. Steel had a claim against McKerrihan, which, on the said 13th day of July, he transferred or sent out of this Commonwealth to the State of West Virginia and there issued an attachment for the collection of the said claim, and attached in the hands of the Baltimore and Ohio Railroad Company, as garnishee, the wages due the said McKerrihan who was an employee of the said company in Allegheny county, Pennsylvania. A judgment was recovered on the said attachment and the amount thereof paid to the said Thomas J. Steel, and deducted from the wages due McKerrihan from the said company. On September 25, 1893, McKerrihan brought an action against Steel before a justice of the peace, under the Act of May, 23, 1887, P. L. 164, entitled, 'An Act to secure to laborers within this Commonwealth

the benefit of the exemption laws of this Commonwealth, and to prevent assignment of claims for the purpose of securing their collection against laborers outside of this Commonwealth.' An appeal was taken from the judgment of the justice and entered in this court at No. 431 October Term, 1893, and the plaintiff recovered judgment in this court on said appeal for \$81.07, the amount of McKerrihan's wages attached and collected in the State of West Virginia by said Steel. Subsequently, at No. 37 October Term, 1894, a judgment was entered in this court in favor of the said Thomas J. Steel for the use of his wife, Lizzie M. Steel, against the said McKerrihan. On the 5th day of July, 1894, at No. 38 October Term, 1894, an attachment execution was issued on the said judgment and the said Thomas J. Steel was made garnishee; interrogatories were filed and the said Thomas J. Steel answered that McKerrihan had recovered a judgment against him in this court at No. 431 October Term, 1893, for the sum of \$81.07 on the 18th day of June, 1894. On the 4th day of August, 1894, McKerrihan presented his petition setting forth the facts and asking the court to quash and set aside the said attachment at the costs of the plaintiff. McKerrihan claims that the amount due him from Thomas J. Steel and recovered in the said judgment at No. 431, October Term, 1893, was for wages for manual labor and, as such, is not liable to be attached in this proceeding. The use plaintiff, Lizzie M. Steel, filed an answer to the rule to quash the attachment and denied the right of the defendant, McKerrihan, to have the attachment quashed for the reasons that she was the *bona fide* holder, for value, of the said judgment, and without any notice of any equities existing between McKerrihan and Thomas J. Steel, and denying that the judgment recovered by McKerrihan at No. 431 October Term, 1893, was for wages for manual labor averring that it was for a penalty under the provisions of the Act of Assembly of May 23, 1887.

"Can this attachment be sustained? If it can it renders the Act of May 23, 1887, nugatory and valueless to the laborer whom it was intended to protect. In construing this act, we must be guided by its intention and purpose. The title to the act distinctly says that its object is, 'to secure to laborers the benefit of the exemption laws of this Commonwealth.' The act itself shows that it was passed to secure to the laborer 'the right to have his personal earnings and property exempt from application to the payment of his debts according to the laws of this Commonwealth.' Keeping in view the object of the act obtained from the title and

the act itself, we cannot see how this attachment can be sustained. It would be of little avail to the wage-earner to secure a judgment under this act for the 'debt and interest' of his claim if his creditor could at once sell and assign his claim and have the laborer's judgment attached, as claimed in this case. It would be contrary to the intention of the Legislature as exhibited in the act itself and to the purposes for which it was passed, and hence we do not think that construction should be given to the act. While, apparently, McKerrihan's claim, as evidenced by the judgment at No. 431 October Term, 1893, is a penalty, yet the 'debt' allowed to be recovered under the Act of May 23, 1887, is certainly the wages that were attached in the West Virginia proceeding; and we do not think it is going too far to say that it bears that character, even after the claim is reduced to a judgment in the proceeding under this act. This construction of the act will give to the wage-earner 'his right to have his personal earnings exempt from application to the payment of his debts,' as contemplated and required by the Act of May 23, 1887, but the other construction, claimed by plaintiff's counsel, would deprive him of this right.

"The facility with which the laborer could be prevented from obtaining the benefits of the Act of May 23, 1887, if this attachment is to be sustained, is shown in this case. The use plaintiff is the wife of the legal plaintiff. It would be very easy at any time for a creditor with or without consideration to assign his claim to his wife or one of his children and allow them to do for him what he could not do directly for himself. We do not think we are warranted in giving such a construction to this Act of Assembly, and we, therefore, quash this attachment."

The use plaintiff appealed, assigning as error the order entered by the court below.

For appellant, *J. P. Teagurden*.

Contra, *R. L. Crawford*.

Opinion by McCOLLUM, J. Filed January 6, 1896.

The legal plaintiff, having a claim against the appellee sent the same to West Virginia for collection out of the wages of labor due to the latter from the Baltimore and Ohio Railroad Company. He succeeded in getting possession of the wages due from the company to his debtor, who, under the provisions of the Act of May 23, 1887, recovered a judgment against him for the amount of them. He held a note against the appellee which he transferred to his wife, who entered judgment upon it in Allegheny

county, and issued an attachment execution for the purpose of appropriating the wages, for which judgment was recovered against her husband. The learned court below thought the protection afforded to the laborer by the act referred to could not be taken from him in this manner, and accordingly quashed the attachment.

The contention for the appellant is that the judgment against her husband represents a penalty imposed by the statute for a violation of it, and that the legislation exempting the wages of labor from attachment for debt, is not applicable to the case in hand. In considering her claim, it must be remembered that the exemption of the wages of labor from seizure on execution process was intended for the benefit of the debtor and of his family, and that he cannot waive it: *Firmstone v. Mack*, 49 Pa. 387. It must also be borne in mind that the dominating purpose of the Act of May 23, 1887, was to afford additional security to the exemption previously granted to them, and that if her contention is sustained this purpose will be substantially defeated. Her husband, in violation of this act, and with intent to deprive the appellee of the right to have his personal earnings exempt from application to the payment of his debts, according to the laws of the Commonwealth, instituted proceeding in an adjoining State, and by virtue of them, obtained possession of his debtor's wages. Can he now apply the judgment recovered against him for the amount of the wages so obtained, in payment of claims he holds against the appellee, or has transferred to his wife? The act, which gives the action against him, limits the recovery to the wages appropriated in defiance of it, and denies to him the benefit of the exemption laws of the Commonwealth upon any execution process issued upon any judgment obtained in the suit.

It seems to us upon due consideration of the case that the judgment recovered in the action given by the statute represents the wages collected in violation of it, and that the creditor holds the wages so collected subject to the exemption applicable to them in the hands of his debtor's employer.

The order quashing the attachment is affirmed.

—A decree of divorce in favor of a wife, rendered without service on the husband and when his whereabouts were unknown, is held, in *Hunter v. Hunter* (Cal.), 31 L. R. A. 411, insufficient to estop her from subsequently alleging the death of the husband before the granting of the divorce.

Superior Court, Penn'a.

COTE v. SCHOEN, Owner, etc., and BEIGHLEY,
Contractor.

The loss of a written contract for erecting a building being shown, evidence by the owner that "I was to pay the money as the work went on, and that no liens should go on my house," if believed, establishes the substance of a complete and valid agreement within the rule laid down in *Nice v. Walker*, 153 Pa. 123, and later cases.

Appeal of George M. Cote, plaintiff, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action *sci. fa. sur mechanic's lien*, brought by George M. Cote against Anna E. Schoen, owner, or reputed owner, and John F. Beighley, contractor, to recover \$472.14 for lumber furnished in and about the erection of a dwelling house in the city of Pittsburgh.

Upon the trial before EWING, P. J., the following facts appeared: Anna E. Schoen, owner of land in the Twenty-second ward, of the city of Pittsburgh, contracted with John F. Beighley, for the erection of a dwelling house thereon. Beighley made a sub-contract with George M. Cote, agent, the plaintiff, for the lumber. Cote filed a lien for the amount of the contract and extras, and for further material furnished the owner after the contractor had absconded, and issued a *sci. fa.* The defense made was that "by the terms of the agreement entered into for the erection of said dwelling house, Beighley was to furnish material used at his own cost and expense, and to complete said house and to deliver the same to affiant free of liens. Neither the affiant nor the house and premises described in said liens were to be charged to any third party, nor were the same to be charged with any liens." The contract was in writing, and its loss having been proved, evidence was offered as to its contents. The defendant testified, that the contract contained a stipulation "to pay the money as the work went on, and that no liens should go on the house." A witness for the defendant, H. Swogger, who had directed the preparation of the instrument, testified that its substance was that "the house was to be built for \$2200, and delivered free of encumbrance." On the other hand, the contractor Beighley testified, on behalf of the plaintiff, that he did not remember that anything was said concerning liens or encumbrances.

That plaintiff submitted the following point: That the agreement in reference to waiver of liens, as testified to, was insufficient to take

away the plaintiff's right to file a lien in this case. *Answer*.—Refused. (First assignment of error.)

The court charged the jury, *inter alia*, as follows:

"As to whether or not the plaintiff was entitled to recover at all depends on this question under the law, as interpreted by the Supreme Court, and I think it a wholesome one, when a contract is made for building a house the owner may stipulate, or the parties may stipulate, that no liens shall be filed, and if that is done then neither the contractor nor any sub-contractor can file a lien, and there is no hardship in that rule, because it would have been very easy for Mr. Cote, furnishing this lumber, to go to Mrs. Schoen, owner of the house, and ask her about that, and ask what the contract was, or a reasonable protection would have been to ask the contractor to show him the contract, and if that stipulated against liens then he would have known that he had nobody but Mr. Beighley to look to. It is a good deal easier for the party furnishing the material to see the contract, or inquire from the owner in regard to the contract than it is for the owner to go around looking for every material man, so in this case Mr. Cote, when he furnished the lumber without inquiring of Mrs. Schoen as to what the contract was, or seeing the contract, which he admits he did, took the risk of there being a stipulation against liens being filed. It seems that there was a written contract, and it was lost. Counsel for the plaintiff have asked us to say to you that the agreement in reference to waiver of liens, as testified to, is insufficient in law to take away the plaintiff's right to file a lien in this case. We refuse that. We think it is sufficient. If in that contract there was a stipulation, as Mrs. Schoen says, that no liens were to be filed, it was binding both on Beighley and Cote, and I repeat that where he furnished the lumber without seeing the contract or inquiring of the owner about it, he took the risk of that being in the contract."

Verdict for the defendant and judgment thereon, whereupon the plaintiff took this appeal, assigning for error, *inter alia*, the refusal of this point, and the portion of the charge given above.

For appellant, *Jennings & Wasson*.
Contra, *J. McF. Carpenter*.

Opinion by RICE, P. J. Filed May 11, 1896.

The defense in this case was that the contract between Beighley, the builder, and the defendant, contained a stipulation that no liens should be filed against the building. There was no dis-

pute as to its other provisions. The contract was lost. The defendant, an unlearned woman, testified that the contract contained a stipulation, quoting her language, "that I was to pay the money as the work went on, and that no liens should go on my house." Mr. Swogger, who dictated the paper, testified, that its substance was, that "the house was to be built for \$2200, and delivered free of encumbrances." Mr. Beighley testified that he did not remember that anything was said concerning liens or encumbrances. Whatever may be said of the legal effect of such a stipulation as that of which Mr. Swogger gave the substance, the testimony of Mrs. Schoen, if believed, established the substance of a complete and valid agreement within the rule laid down in *Nice v. Walker*, 153 Pa. 123, and later cases. No nearer approach to literal exactness, in giving the contents of the lost paper, could be expected, or was required to carry the case to the jury. It would have been error to charge them that the agreement, as testified to, was insufficient to take away the plaintiff's right to file a lien, or that the evidence was insufficient to establish the agreement. The learned judge told the jury in plain terms, that unless they found that the contract contained a stipulation that no liens were to be filed, as testified to by Mrs. Schoen, their verdict should be for the plaintiff. In the absence of a request for more specific instructions, the plaintiff is not in a position to complain.

The portion of the charge complained of in the third assignment of error, contains an accurate statement in plain language of the rule of law applicable to the case. The learned judge having stated the rule correctly, it was not error to tell the jury that if the contract contained the stipulation against liens testified to by Mrs. Schoen, the application of the rule of law would work no hardship against which the plaintiff could not have protected himself by proper diligence. This may not have been absolutely necessary, but it was not misleading. A careful judge will not always content himself with a dogmatic statement of the law applicable to the case, and even if he is not bound to go further, it is certainly not error to point out to the jury, the just and reasonable principles upon which it is based.

We see no error in the charge, and the assignments are all overruled.

Judgment affirmed.

DENNISTON v. THE PHILADELPHIA CO.

The damages caused by the negligent operation of a pipe line for gas cannot be considered in a condemnation proceeding.

Affirming same case reported in 161 Pa. 41.

In a condemnation proceeding, testimony that there is danger, in case gas would escape, of buildings being burned, is incompetent.

Evidence of depreciation in value of property by reason of leaks in a gas line, as laid through it, is incompetent.

A request that the jury view the premises in a condemnation proceeding, as required by the Act of 21st May, 1895, P. L. 90, must be made by the party desiring it before closing his case in chief. If made after the evidence is all in it is discretionary with the court to allow or refuse it.

Appeal of the Philadelphia Company, defendant, from the judgment of the Court of Common Pleas of Washington county, in a proceeding to assess damages for the laying of an oil pipe line through the premises of William and Thomas Denniston.

This case came into the Court of Common Pleas by an appeal from the report of viewers and was tried before McILVAINE, P. J., a verdict and judgment were given for plaintiff for \$933.75, which judgment was reversed by the Supreme Court, 161 Pa. 41; 41 PITTSBURGH LEGAL JOURNAL, 416, and a new *venue* granted. The case then came on for trial, before GREER, P. J. The facts, evidence and matters of law arising on the trial appear in the opinion of the Superior Court, *infra*. Verdict for plaintiff, \$675 and judgment thereon. The defendant took this appeal.

For appellant, *Todd & Wiley*.

Contra, *Boyd & E. E. Crumrine*.

Opinion by WICKHAM, J. Filed May 11, 1896.

On or about October 19, 1891, the appellant company, acting under its conceded right of eminent domain, entered on the farm of the appellees, containing 225 acres, for the purpose of laying across the same a pipe line for the transportation of natural gas. The line, which is twenty inches in diameter and about one hundred and twenty-four rods in length on the appellees' land, was completed in November, 1891. More than a year thereafter, the damages caused to the property were assessed by viewers appointed by the Court of Common Pleas. From their report, the appellees took an appeal. The case was tried before a jury, and on an appeal taken to the Supreme Court by the appellant here, the judgment of the court below was reversed. See report in 161 Pa., page 41.

The reasons for the reversal are so necessary to be considered here, that we quote freely from the opinion. Says the court: "The principal

inquiry on the trial of the case in the court below was how much, if any, was the market value of their farm reduced by such appropriation. To enable the jury to answer this question intelligently, it was proper to introduce evidence showing how the farm was affected by the location and construction of the pipe line upon it. It appeared from the evidence submitted for this purpose that the most serious injuries complained of, such as the destruction of the grass and other crops along and on both sides of the line, and of a valuable spring in the vicinity of it, were traceable to leaks in the main. The evidence, however, did not furnish any basis for determining whether the leakage was attributable to the negligence of the company in the construction and care of its line, or came in spite of the employment of the best known skill and appliances to prevent it; but it is clear that the leakage and its consequences were taken into consideration by the jury, in forming an opinion in respect to the depreciation of the market value of the farm, by reason of the location of the pipe line upon it. One-half of Joseph Estep's estimate of the depreciation was based on the leakage, and two-thirds of the estimate of the same by Joseph Pierce and W. F. Morrison rested upon it. Indeed, it is apparent that the estimates made by most of the plaintiffs' witnesses were materially affected by the leakage which they discovered on their examination of the line, a year or more after its completion. As these estimates and the evidence on which they were formed were for the consideration and assistance of the jury in ascertaining the depreciation in the market value of the farm, it is probable that the verdict was affected quite as much by the leakage and its consequences as the opinions of the witnesses were. It could not well be otherwise, because although the learned court instructed the jury that injuries to the property resulting from a negligent operation of the line could not be considered in a proceeding for the assessment of damages occasioned by the location and construction of it, the evidence descriptive of the leakage failed to assign the cause of it. Was the leakage shown by the evidence consistent with skill in the construction and care in the operation of the line, or was it due to the negligence of the company in both, or either? A satisfactory answer to this question must have something more substantial to support it than conjecture, it must be founded upon evidence. If the leakage was the result of negligence, it was not an element to be considered in this issue. Hence there should have been evidence in the case which would have enabled the jury to find

the cause of it; but there was none. To the extent, therefore, that the verdict was founded upon the evidence of the leakage and its effects, it was a mere guess.

"In obtaining, transporting and distributing the product of the gas fields, skill and care are required, in order to minimize the risks to persons and property incident to the business. The inconveniences and injuries caused by the location of a skillfully constructed and carefully operated pipe line may be considered in a proceeding for the assessment of damages to the land through which it passes, but such as are produced by the careless construction of it cannot be. The former are the natural and ordinary consequences of the location, construction and use of the line, and terminate only with the abandonment of it, while the latter are exceptional and may be prevented by the use of the best known appliances and skill, and the observance of due care, in the prosecution of the business, and they constitute an independent cause of action.

"In this case the plaintiffs were entitled to be compensated for the depreciation in the market value of their farm, due to the location and construction of the pipe line, but not for injuries caused by the negligent operating of it. In considering their claim we must not lose sight of the fact that their right to damages accrued on the location and construction of the line, and that it was in no sense enlarged or abridged by subsequent occurrences. Nor did their delay in the enforcement of their right affect in any degree the amount of the damages recoverable on account of the appropriation of the land. We must, therefore, regard the case as if they had brought and tried it before there was any leakage of gas along the line. If they had done so, would they have been permitted to show that there might be a leakage which would render useless a strip of land, from thirty to fifty feet in width, along the entire line, and destroy a valuable spring in the neighborhood of it? We think not, unless it appeared that such would be the natural and ordinary result of the appropriation.

"It is of the first importance to the parties that the evidence in cases of this nature should be restricted to matters proper for consideration in ascertaining the depreciation in the market value of the land. Matters which may be so considered must be introduced, if at all, on the trial of the action for damages caused by the location and construction of the line, because the land-owner cannot be compensated for them in a subsequent suit. An injury which is or may be produced by negligence in the operation or

care of the line is not such a matter. It may be that the leakage complained of in the case before us was due to the company's negligence and that a continuance of it may be prevented by proper repair and careful operation of the line. If so, the learned court below erred in admitting and allowing the jury to consider the evidence of it. There was no attempt to show that it was inseparable from, or a natural and ordinary consequence of the location and construction of the line, and yet it may have affected the verdict, as it did the estimate of the witnesses. In the absence of affirmative evidence that it was at least consistent with a proper location, construction and operation of the pipe line, it was not an element to be considered in this case."

At the second trial the court below unfortunately again admitted much of the same testimony which was condemned in the above opinion. Joseph Estep, who seems to have visited the *locus in que* three times, once before the view and twice thereafter, was permitted to testify, in the face of objections, that the damage to the farm, which he said, largely resulted from leakage, was eight to ten dollars an acre. This witness freely admitted that he knew practically nothing as to the cause of the leakage, to what extent it had prevailed, or how long it had continued. His estimate of the injury caused to the farm when he testified before the viewers, was from four to five dollars per acre. He was so impressed by the leaks he saw on his second visit, that he doubled this estimate. It is plain from his testimony that, as at the first trial, at least one-half of his estimate of the damage done was based on the leaks which he observed during his second visit to the farm. His estimate was entirely incompetent. It is easy to see that if, through some accident or negligence, the pipe had burst just before the last trial and temporarily filled the earth and air with gas, the plaintiff might easily have rallied a host of witnesses like the one just mentioned, who could, perhaps, without stretch of conscience, testify that a large part of the farm was, when they were taken to see it, rendered practically useless and valueless; and yet the break might be repaired a few hours later. This illustration, while perhaps suggesting an extreme case, shows the danger attending the admission of testimony like that given by Estep.

The testimony of Thomas Cushing, who was called by the appellees as an expert, does not make Estep's testimony competent. Cushing was properly allowed to state that there would be necessarily by reason of expansion and contraction, some leaks, from time to time, in a line

like that laid by the appellant. He added that they could and should be promptly stopped, and that to permit them to continue would be negligence. Nowhere, however, is there any evidence tending to show that the leak and the effects thereof spoken of by Estep and other witnesses for the appellees, were natural and ordinary results of the presence of the pipe line, assuming that it was constructed properly and operated without negligence.

For negligence the gas companies are expressly made liable by section 10 of the Act of May 29, 1885, P. L. 29, and to permit a recovery in this proceeding for things which may be made the grounds for another action, or perhaps many actions, would be illegal and unjust.

The second assignment of error is sustained. The first assignment relates to a kindred matter, but as the evidence objected to is not set forth, we cannot consider it.

The third assignment complains that W. E. Morris was permitted to testify that there is danger, in case gas would escape, of the farm buildings being burned. This testimony should have been rejected for two reasons: first, because the witness was allowed to base his opinion on any escape of gas, however negligent the same might be; and second, because the opinions of experts or non-experts are not admissible on the subject matter of the inquiry. In *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. 266, GORDON, J., well says: "How any person can be said to be an expert in that which is not and cannot be followed as a business, or in that which must necessarily result from observation of a character so general that it must be common to every person, we cannot understand. The opinion of a witness who neither knows, nor can know, more about the subject matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible * * * were it otherwise the opinions of jurors upon the most obvious facts might be always shaped for them by the testimony of so-called experts, and thus would a case be constantly liable to be determined, not by the opinions and judgment of the jury but by the opinions and judgment of the witnesses."

In that case the attempt was made to introduce in evidence the opinions of alleged experts, that the erection of certain new buildings near the one insured by the appellant company increased the risk by adding to the danger of fire. The case is cited approvingly in *Lincoski v. Susquehanna Coal Co.*, 157 Pa. 158, and the rule therein laid down, again applied. In the present case it is proper to show the proximity of the buildings to the pipe line, their character

and like matters, but the opinions of witnesses, that buildings are in danger of being burned by reason of escaping gas, are entirely inadmissible. The jurors, under proper instructions from the court, must be let draw their own inferences from the facts. The third assignment of error is sustained.

It is proper to say here that the learned trial judge, some time after the testimony complained of in the third assignment was received, intimated (but whether or not in the hearing of the jury, we cannot say) that he would strike out this evidence. It was probably through inadvertence he failed to do so, or to instruct the jury to disregard it. The learned counsel for the appellees, in his paper-book, deals with Morrison's opinion as having remained before the jury and argues in favor of its admissibility, and we, therefore, cannot assume that it was not left in the case. The fourth and fifth assignments must also be sustained. The defendant's third and fourth points therein referred to should have been unqualifiedly affirmed. The appellee's witnesses were permitted, under exception, to give estimates as to the depreciation in the value of the land, admittedly based in part upon all the leaks and their results. No effort was made to distinguish between the true and false elements of damage; indeed, the appellee's counsel informed the court that it was impossible to do so. It is only necessary to say that a witness who could not do this should not have been allowed to give any estimate whatever which rested in any degree on the fact of the leakage. As it was, witnesses who were clearly incompetent on their own showing were heard on this branch of the case and practically nearly everything that the Supreme Court held should have been excluded, was worked in, ostensibly "to give the jury light," the almost necessary consequence being to enhance the verdict. The affirmance of the points in question would hardly have undone the harm caused by admitting the testimony, but whatever protection it might have afforded, the appellant was entitled to. It was all in vain to caution the jurors not to allow their verdict to be influenced by injuries caused by negligence. How could they know from such evidence what injuries belonged to the class they might consider as proper elements of damage, or to the other class which they were to disregard? The appellees' counsel said he could not do this, when he was offering evidence of the injuries and their causes, and it would therefore be too much to expect the jury to intelligently draw the dividing line.

The appellees had the right to prove, as was done by the expert witness, Cushing, that some

leaks would unavoidably occur, and they might corroborate this theory by showing that they did occur, but they should have shown affirmatively that such leaks were not avoidable by due care. Evidence of leaks merely and their consequences, without more, should not have been admitted for any purpose. As said before, to permit this might lead to a double recovery against the appellant.

The sixth and last assignment of error complains of the refusal of the court to send the jury to view the premises over which the pipe line extended, as required by the Act of May 21, 1895, P. L. 90. This assignment cannot be sustained. The request for the view came too late. The record shows that it was not made until after the evidence was closed on both sides. The view pertains to the evidence, and properly the motion therefor should be made by the party desiring it, before he closes his case in chief. If made after all the evidence is in, it is discretionary with the court to allow or refuse it. The better practice is to make the motion, or at least to give notice thereof, as soon as the jury is sworn, so that the proper and timely arrangements can be made for taking them to the premises. To grant the motion after the evidence is closed on both sides, and the witnesses perhaps dismissed, might lead to unfair practices and results. Things appearing on the ground and needing explanation often could not be explained. The courts of first instance have the power, and perhaps they should exercise it, to regulate this matter by reasonable rules.

The judgment is reversed and a venire factas de novo awarded.

Court of Common Pleas No. 2.

IN EQUITY.

SMITHKO et ux. v. PITTSBURGH & WESTERN RAILWAY COMPANY.

Water is a material, in one sense of the word, just as gravel or timber, but the Act of Assembly of 1849, P. L. 83, § 10, as well as the Act of 1856, P. L. 288, § 2, evidently contemplated the use and storage of water by the railroad as a necessary part of the construction of the road for the purpose of running its locomotives. A water station necessarily means a place for the storage of water for use of the railroad. What these stations may be and how far they may extend, is not declared in the acts. Often, perhaps, generally, the reservoirs for the storage of water for use of the railroad locomotives are wooden or iron tanks, but not necessarily so; nor does the Act of Assembly provide or intimate how or what they shall be. It must be left, then, to the reasonable discretion of the railroad authorities, governed by the necessities of the case.

The Act of 1856 is a legislative construction, that in the right to construct water stations, the Legislature meant to include the taking of waters and water rights, under the power of eminent domain.

A reservoir is a necessary part of a water station.

No. 438 July Term, 1896.

EWING, P. J.

FINDING OF FACTS.

By deed dated the 28th day of February, 1896, the plaintiffs, husband and wife, became and are jointly the owners of the tract of land situated in Richland township, and described in the first paragraph of plaintiffs' bill, containing forty-eight acres. The defendant is a railroad corporation, duly organized and chartered, with authority to locate, build, maintain and operate a railroad from Allegheny City through this district to New Castle, Pennsylvania, and also operating a road running through to Akron, Ohio, with different branch roads, and its main road is located in the immediate vicinity of plaintiffs' property. Formerly the defendant's line of railroad ran by a long, sharp loop or bend over a portion of the plaintiffs' property, to avoid the ravine which is in question in this case, but in recent years the road was straightened and shortened by filling the ravine a short distance below plaintiffs' property and the portion of the old track through plaintiffs' property has been abandoned and is now, according to the testimony, used as a common road for plaintiffs.

In order to obtain a necessary water supply the defendant prepared to erect a dam across the low ground or ravine, for a length of about two hundred and forty feet, using the right of way and embankment of the road, with due precautions, as the dam, and to raise that embankment to a height of twelve feet above the natural bed of the stream. This will necessarily back up the water a distance of about two hundred feet through Mrs. Wilson's property, through which the line is constructed, to the line of plaintiffs' property, and on up the valley about nine hundred and sixty feet through plaintiffs' property, making the total length of the back water of the dam about twelve hundred feet, and to include all the ground of plaintiffs that will be immersed or affected by back water. Defendant proposes, under its claim of eminent domain, to condemn for such purpose and use the portion of plaintiffs' property to be so covered by the water, no part of the dam or works being on the plaintiffs' property, and also to condemn, if necessary, the portion of Mrs. Wilson's property to be affected by the construction of the dam on their own right of way.

This will, of course, damage plaintiffs' property to some extent. While we have no idea that the damage would be any approach to the amount or proportion of the value claimed by plaintiffs, we do not deem it necessary to go into that question, because, if the defendant has a right to condemn, under its powers of eminent domain, it will be compelled to pay whatever damages may be suffered by plaintiffs.

The proposed construction by the defendant will not cut into and sever completely the plaintiffs' farm, as alleged in the bill. It will divide, by the water course, a distance of nine hundred and sixty feet, but the back water will not come anywhere near cutting the farm in two, nor will it affect the spring or springs on plaintiffs' land. The testimony shows that the spring alleged to be affected is four feet higher than the high water of the dam.

As to the necessity, the testimony shows that for several years past operations and drilling for oil and gas have been carried on in the region through which this road passes, and there have been large operations within the past year; that this boring for oil and operating oil wells has polluted the streams of water that might ordinarily supply the defendant with the water necessary for its locomotives, and also that it has polluted the under currents of the water, so that wells drilled by the defendant to furnish a supply, furnish a character of water totally unfit for use in boilers. The manner in which this takes place is fully described and set forth in the case of *Collins v. The Chartiers Natural Gas Co.*, 131 Pa. 143. The testimony of experts shows that the water to be found in the streams in that region and in the wells that have been drilled, has become so impure and mixed with chloride of sodium, various salts of lime and sundry other substances, that it is unfit for use and has not only incommoded the defendant in its operation of its locomotives and road, so that it became much more expensive to operate the road, but it is actually unsafe and the safety of the public and the parties operating it, requires that a purer supply of water be had, and from Allegheny City to Calvary Junction, a distance of twenty-five miles, or more, and for a considerable distance beyond, there is, so far as known, no suitable supply of water to be had. This point is about eighteen or nineteen miles from Allegheny City.

In running its road, the defendant requires from one hundred to one hundred and fifty thousand gallons of water daily, for use in the portion of the road to be supplied from this proposed station or reservoir. The place where it is proposed to erect these works is across a

stream having a water shed of about a thousand acres. It has different springs, also, that flow therein. The proposed reservoir is contemplated to be constructed so as to retain about nine million gallons of water, which, it is supposed, will be a sufficient reserve supply, with the supply from the springs in the summer season, to furnish the necessary water, even in dry weather. Another fact in regard to the question of necessity, is that in dry seasons, and especially such a season as last year was,—last September and October,—and perhaps the two or three preceding years, the supply of water from streams or from any source in the county was insufficient to supply the wants of this road, and it is notorious that many of the railroads in this vicinity were short of water. It is necessary to the operation of the road that a supply of pure water should be found for use in locomotives, and a large supply. The testimony shows that the supply to be obtained from this water shed, which will be the principal source of supply, is as nearly pure as can usually be obtained for such purposes, and we find as a fact that such a reservoir of water is necessary to be had in some way for the proper and safe use and operation of the road. In finding that it is necessary and that some similar work to this is necessary, we mean not an absolute necessity, not that it is absolutely impossible to get water in other ways, such as hauling it in water tanks along the road, but a reasonably necessary and practicable operation. We mean it is impracticable to get it in any other way.

It should further be found that the company proposes to run pipes from this reservoir or water station, along its right of way or otherwise, to a station several miles east, and to another station several miles west of this particular location.

CONCLUSIONS OF LAW.

The defendant claims that under the tenth section of the Act of 19th February, 1849, P. L. 88, giving railroads the right of eminent domain, it has the right to condemn this property for the purposes proposed. The plaintiffs deny that the act gives any such rights. If the Act of Assembly does not, either in direct terms or by plain implication, give this right, then it is the duty of the court to decide the case in favor of the plaintiffs, notwithstanding our opinion that the railroad company should have such a right. It would then be the province of the Legislature to determine whether or not the act should be extended. If the act fairly construed, does give the company this right, then it should be permitted to take the necessary

statutory measures to condemn the property if it cannot agree with the owners as to the damages.

We are of the opinion that the fact that plaintiffs' land does not abut on the ordinary right of way of the defendant, is not a bar to the condemnation. It might be, and not frequently is, the case that a right of way is located along the line of two adjoining properties and they each can be condemned, and if the railroad has a right to go beyond the sixty feet of its original right of way, it can go the necessary distance, whoever may own the property.

The act on which the defendant relies provides that the occupancy of land, "without the consent of the owner, * * * except in the neighborhood of deep cuttings or high embankments or places selected for sidings, turn-outs, depots, engines or water stations," shall not exceed "sixty feet in width, and thereupon to lay down, erect, construct and establish a railroad, with one or more tracks, with bridges, viaducts, turn-outs, sidings or other devices, as they may deem necessary or useful, between the points named in the special act incorporating such company," and so on, and "by themselves or other persons employed as aforesaid, to enter upon and into and occupy all land on which the said railroad or depots, warehouses, coal-houses, engines and water stations, other buildings or appurtenances may be located or which may be necessary or convenient for the erection of the same, or for any purpose necessary or useful in the construction, maintenance and repairs of said railroad." The second section of the Act of 9th of April, 1856, P. L. 288, provides that in all cases where the parties cannot agree upon the amount of damages claimed, or by reason of the absence of legal incapacity of such owner or owners, no such agreement can be made either for *lands, water, water rights* or materials, the company shall tender a bond, etc.

So far as the authorities, furnished by the learned counsel for the parties, go, and so far as we have been able to discover, this question has not been decided.

In the case of the *Cumberland Valley Railroad Co. v. McLanahan*, 59 Pa. 23, the railroad company was organized by a special Act of April 2, 1831. It is said in that case that the act did not give the company power to condemn land for the purpose of erecting a freight depot, although convenient for them; but on examination it will be found that the act differed from the general Act of 1849, and that while it gave the company very large powers of doing business and of erecting structures for the purpose of business, nevertheless, as to its right of

eminent domain, it was limited, and, as said by Judge SHARSWOOD, they had power to enter and occupy, under the right of eminent domain, for the purpose of making said railroad only so that it is not an authority in the construction of the Act of 1849. The right of the railroad, in that case, to construct and maintain its depot on the ground in question, was decided in its favor on other grounds, viz., license and consent.

In the case of *Strohecker v. The Alabama & Chattanooga Railroad Co.*, 42 Ga. 509, which seems to maintain the right of the railroad company to take a spring a quarter of a mile from its station and carry it in pipes to its road, the charter of the railroad company seems to give a somewhat broader right to go beyond the right of way, than is given by our Act of 1849, and that does not seem to govern this case.

In the case of the *Pennsylvania Railroad Co. v. Miller*, 112 Pa. 34, while it was held that the railroad company took the water, as against the owner below, as riparian owner and not by right of eminent domain, it is said, *arguendo*, that the railroad company might take the water, under its right of eminent domain, and pay for it. This, however, is a mere *obiter dictum*, not necessary to the decision of the case.

In the case of the *Cleveland & Pittsburgh Railroad Co. v. Speer*, 56 Pa. 326, it is said that the power to construct a railroad necessarily includes the authority to make switches, although not expressed, and that side tracks, also, are essential to the use of the road.

As before said, no case has been cited to us that in our judgment governs this case. It is a question of reasonable construction of the statute in the light of the circumstances.

Water is a material, in one sense of the word, just as gravel or timber, but the Act of Assembly of 1849, as well as the Act of 1856, quoted, evidently contemplated the use and storage of water by the railroad as a necessary part of the construction of the road for the purpose of running its locomotives. A water station necessarily means a place for the storage of water for use of the railroad. What those stations may be and how far they may extend, is not declared in the act. Often, perhaps, generally, the reservoirs for the storage of water for use of the railroad locomotives are wooden or iron tanks, but not necessarily so; nor does the Act of Assembly provide or intimate how or what they shall be. It must be left, then, to the reasonable discretion of the railroad authorities, governed by the necessities of the case. The pollution of so large a number of streams of water in our State, by manufactories and mines, and by the boring

and pumping of oil and gas wells in the vicinity, has, to a considerable extent, changed the circumstances and made it necessary to procure a supply of water in a different way or to make the water station in a different way from what was the custom in former years. It is a notorious fact that in many parts of the country, during the past year, there was a great scarcity of water for the running of locomotives and water had to be transported, at large expense, a very considerable distance, for the purpose.

The Act of 1856, which provides for the tender of a bond as compensation for the taking of lands and of water and of water rights or materials, is not conclusive, but it is a legislative construction that in the right to construct water stations, the Legislature meant to include the taking of waters and water rights, under the power of eminent domain. It seems to us that this is a reasonable construction of the act. It might be well for the Legislature to define more clearly the rights of railroad companies, in regard to water stations and waters and water rights, but in the case now before us, it seems to us that in making its reservoir—a reservoir being a necessary part of a water station—the defendant company is exercising a reasonable discretion in the manner in which it proposes to erect the works, to meet a pressing necessity for the operation of the road.

The defendant disclaims any intention of flooding the plaintiffs' property, or affecting it, until it has either agreed with the owner as to the price or has filed a bond conditioned for the payment of all damages that may be found against it.

That a decree be drawn dismissing the plaintiffs' bill without costs.

For plaintiffs, *Shiras & Dickey* and *M. A Woodward*.

For defendant, *Johns McCleave*.

—An entry of an account in a savings bank in the names of husband and wife, subject to the order of either and to survivorship on the death of either, made by a transfer of funds from a former account in the name of the husband alone, but designating his wife as the person to whom payment should be made in the event of his absence or death, is held, in *Metropolitan Savings Bank v. Murphy* (Md.), 31 L. R. A. 654, to make a new account entirely separate and distinct from the former, so that the testamentary character of the old account would not inhere in the new one and make it admissible to probate. The authorities upon joint accounts in savings banks are found in a note to the case.

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No. 3.

PITTSBURGH, PA., AUGUST 12, 1896.

Supreme Court, Penn'a.**KLEPPNER v. LEMON.**

There is an implied condition in every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent the lessee shall put down so many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee; and the mere fact that the lease mentions but one well does not exclude this conclusion.

The determination of the number and location of wells necessary to carry out the object of an oil lease belongs primarily to the lessee, but he must take into consideration the fact that his lessor is the owner of the oil and so conduct his efforts as to bring it to the surface for the benefit of both parties.

A lessee who, instead of sinking a sufficient number of wells to properly bring the oil to the surface of the demised premises, becomes interested in wells on adjoining land, and attempts to obtain the oil from the lessor's land through the wells on the adjoining premises, will be compelled in equity either to sink a proper number of wells on the demised premises or give up his lease thereof, where it appears that oil in paying quantities is obtainable therefrom.

MITCHELL, J., dissents.

Appeal of D. P. Lemon, defendant, from the decree of the Court of Common Pleas No. 2, of Allegheny county, in a suit in which John Kleppner was plaintiff.

John Kleppner filed a bill averring that he had given to defendant, D. P. Lemon, a lease dated June 15, 1894, of a tract of land containing about ten acres, to operate for gas and oil, for the term of two years, and as much longer as oil or gas should be found in paying quantities, with the privilege of commencing to drill within thirty days or paying a monthly rental of \$35 until operations were begun; that defendant thereby became obligated to proceed with reasonable diligence to obtain the oil and gas in said land, and not to draw it off, or permit it to be drawn off, through wells so near said lands as to subject it to be drained of its oil or gas to the loss and injury of plaintiff; the defendant completed a well on said land in the spring of 1895, located on the high land near the southern boundary of said tract, which produced and was producing oil in barely paying quantity of five barrels per day; that the plaintiff had insisted

upon defendant putting down another well on the low land of said tract next to the Stotler farm, which defendant had refused to do, for the reason that he was lessee of said Stotler farm, upon which he had completed a well in May, 1895, which produced about 150 barrels of oil per day; that defendant was lessee of the adjoining Garlach farm, upon which he had drilled four or five wells which were good producers of oil, and said wells on said farm, together with the said Stotler well, all operated by defendant, were draining the oil from plaintiff's tract to his great injury and loss, and defendant had refused to drill another well on plaintiff's land; that there was oil and gas under said land which defendant refused to develop for plaintiff's benefit, and which he was draining away through his wells on adjoining lands; that other parties desired to drill another well on plaintiff's land, and had offered him a large bonus for the privilege, and defendant refused to drill or allow plaintiff to secure others to drill another well on said land. He prayed that defendant be enjoined from asserting any right of possession of said land for the purpose of drilling for oil or gas, that an account be taken of the oil from defendant's land drained off by defendant through his wells on other lands, that defendant's lease of plaintiff's land be declared forfeited, that (on failure to decree as aforesaid) defendant be required by decree to put down so many wells as might be required to fully develop plaintiff's land and procure the oil and gas therefrom, and that full damages be decreed in favor of the plaintiff.

The answer admitted the lease of plaintiff's tract containing seven and three-tenth acres, and averred that the well drilled thereon was located with the full consent of plaintiff near the southern boundary, for the reason that two wells, in which neither plaintiff nor defendant were interested, had been located near said boundary on the Mrs. Stewart farm; that defendant's lease of the Stotler land was upon the same royalty as his lease of plaintiff's lands, and he had located the Stotler well 157 feet from plaintiff's land, where it ran to a point, to offset a well located on an adjoining tract; that none of his wells on the Garlach farm were within 400 feet of the nearest line of plaintiff's land, and he had never in any way discriminated against the plaintiff, by his operations on the Stotler or Garlach tracts; that his well on plaintiff's land was drilled at a cost of \$4,500, and he was entitled to hold his lease of the whole tract to secure the production of that well; that he had never drilled a well on any land other than that of the plaintiff, for the pur-

pose of draining the oil from his land, and had no interest in so doing; that he had conducted his operations on plaintiff's tract and adjoining lands in the usual and approved methods, and had in good faith performed all the obligations required of him by his lease; that, while it was impossible to determine with any degree of certainty whether any oil from plaintiff's land was brought to the surface through the Stotler well, he believed from his experience, and from the location of producing and non-producing wells in that oil field, that the oil obtained from said well was drawn from the Stotler farm, and very little, if any, of it, from the direction of plaintiff's land; that he was under no obligation to drill another well on plaintiff's small tract unless the development afforded good reason to believe that it would result in profit to defendant, and said development was such as to afford no reasonable prospect of securing an additional well on said land that would pay the expense of drilling and operating, and that it would not be judicious operating, as practiced among experienced producers of oil, to drill another well on said land under existing conditions.

A replication was filed, and the case came on for hearing on bill, answer and testimony before J. W. F. WHITE, J., who filed the following finding of facts and conclusions of law:

FINDING OF FACTS.

"1. The plaintiff made a lease to the defendant, dated June 15, 1894, for a term of two years, for oil and gas purposes, of a triangular piece of ground, containing between seven and eight acres, in Penn township, this county. The plaintiff was to receive one-eighth of the oil, and if gas was produced in sufficient quantities to justify marketing it, he was to receive \$500 per annum for each well. The defendant had the right to commence a well within thirty days, or, in default thereof, to pay to the plaintiff \$35 a month, in advance, until such well should be commenced or the lease abandoned.

"2. The defendant formed a partnership with other persons in this lease, and also in leases of several other properties in the neighborhood, embracing land adjoining the property of the plaintiff, and they are the real defendants in this case.

"No well was begun on the plaintiff's property until in February, 1895, which was completed in the spring of 1895, producing about five barrels of oil per day. This well was within fifteen or twenty feet of the line on the southern side of plaintiff's property.

"3. In March, 1895, the defendants began a well on the farm of Stotler, adjoining the plain-

tiff's property, and within 157 feet of the line of plaintiff's property, which was completed in May, 1895, at first producing about 120 barrels a day, and still producing about forty barrels a day. The defendants also put down several wells on adjoining property, some of which were good producing wells, and they are now putting down a well on adjoining tract, within 250 feet of plaintiff's line.

"4. The well on plaintiff's land is on high ground and was drilled through hard or compact rock. The Stotler well was through loose rock. It was down on the lower ground, near the creek, and a large portion of the plaintiff's land adjoining it is of the same character.

"5. The defendants have declared their intention not to put down any more wells on the plaintiff's property, alleging that the probabilities of getting a good well would not justify the expenditure, and they have produced witnesses who testify to that effect. They also contend that the present well will drain the whole property, and that the whole tract is necessary for the production of that well.

"6. But I find from the evidence the following facts: That wells drilled in hard and compact rock, in oil districts, are generally small, and drain only a very limited area; that wells drilled in loose rock are generally large and drain a much greater area, sometimes for a distance of 1,000 feet; [that the well on the Stotler farm drains a portion of the oil in plaintiff's farm, and that, during the life of this lease, it, and other wells within 300 feet of plaintiff's line, may drain all the oil from the low ground of plaintiff's land; that there is a strong probability, if not an absolute certainty, that oil can be obtained from the low ground of plaintiff's land, and it might be as good a well as that on the Stotler farm; that the well on the plaintiff's ground will not drain the oil from the low ground, and from the character of the rock, will not, in all probability, drain the oil within a radius of 300 feet.] (First assignment of error.)

CONCLUSIONS OF LAW.

"This lease contains no covenant for full development or putting down any more than one well, and yet it may be fairly inferred that both parties contemplated a full development of that territory, and that as many wells would be put down as might reasonably be supposed would be profitable to both parties. (*McKnight v. The Gas Company*, 146 Pa. 185.)

"But this case does not depend upon the enforcement of such an implied covenant. [The equity of the plaintiff arises more especially out of the circumstances of the case. The defendants are getting oil from plaintiff's property

through wells on adjoining tracts, to his manifest injury, without paying him his royalty. The defendants insist upon holding on to the lease of the whole property and refuse to sink another well, although there is a strong probability, almost a certainty, of getting a good, paying well upon the low ground. Why do they thus refuse? Evidently because they expect to get the oil without the expense of another well. They say they want the whole tract to protect them in the well they have, but, under the evidence, that is not necessary. The present well cannot drain or secure the oil of the whole tract. Its location, and the kind of rock through which it was drilled, clearly indicate that it can drain only a small area, not more than an area of 200 or 300 feet radius around it. If the defendants would relinquish the lease as to the lower portion, plaintiff might get another party to develop it. Why not do so? The answer is easily found: They fear it would get oil which they are now draining from this land, or which they may get by other wells on other adjoining tracts.] (Seventh assignment of error.)

"[Plaintiff's remedy is in equity. Had there been a special covenant in the lease, to sink other wells, doubtless an action on the covenant could have been maintained. But the plaintiff's case rests upon the wrongful acts of the defendants in holding on to the lease and refusing to sink any more wells on it, because they can get the oil from his land by other wells on adjoining tracts. This is a fraudulent use of plaintiff's lease, to his great injury, for which a bill in equity is the proper remedy.] (Eighth assignment of error.)

"The defendants must either develop this territory, by sinking another well, or give up that portion of the land which is not necessary for the protection of the present well. An area of 300 feet radius of this well is amply sufficient for its protection. Defendants should be required to commence another well within thirty days from this date and prosecute it to completion with due diligence, or relinquish to the plaintiff the territory except within a radius of 300 feet of the present well."

Upon this finding and opinion the following decree was entered:

"And now, to wit, December 23, 1895, it is adjudged and decreed that the defendant, D. P. Lemon, is hereby restrained from setting up, asserting, claiming or maintaining as against the plaintiff, or his assigns, or any other present or future lessee of the said plaintiff, or as against any other person, any right, title or claim, by virtue of said lease, to put down any oil or gas well upon any part of the land so leased outside

of and beyond a line around the well on said land operated by defendant and known as the Kleppner well No. 1, three hundred (300) feet from the said well, or to occupy any of the said plaintiff's land so leased by the defendant, excepting so much thereof as is necessary for the operation of the said Kleppner well No. 1, unless the defendant shall within ten (10) days from the notice of this decree file in this case a declaration to the effect that he will proceed to put down another well upon the said plaintiff's land in the lower part thereof, at such place as may be designated by the plaintiff, and shall within thirty (30) days from the date of this decree begin to put down such well upon the said plaintiff's land, and shall thereafter, with due and reasonable diligence, sink the said well to the depth required for obtaining the oil in the one hundred foot sand where the oil is shown to be located and found by the producing well sunk in the land adjoining the plaintiff's land.

"And it is further ordered that John S. Lamble, Esq., is hereby appointed master and examiner to take testimony and ascertain and report to this court the damages suffered and claimed by plaintiff in this case under the charges and prayers of his bill.

"PER CURIAM."

The defendant took this appeal and assigned as error, *inter alia*, the portions of the findings above included in brackets and the decree.

For appellant, *D. F. Patterson*.

Contra, *M. A. Woodward* and *W. G. Guiler*.

Opinion by WILLIAMS, J. Filed July 15, 1896.

This is in substance, though not in form, a bill for specific execution of a contract. The defendant denies that the contract set out in the bill as the basis of the relief asked imposes any obligation, express or implied, upon him to do that which the plaintiff demands of him. The case must therefore depend upon the proper interpretation of the contract, aided by the necessities and usages of the business to which it relates.

The plaintiff is the owner of a lot of land containing seven and one-half acres. The adjoining lands, at least on two sides, were being developed as oil lands by the defendant. He applied to the plaintiff for, and obtained, a lease for oil and gas covering his tract. This lay in a triangular shape with its base about seven hundred and fifty feet long on land of Stewart; its perpendicular resting against the tract known as the Stotler tract; and its hypotenuse about one thousand feet long abutting on the right of way of a railroad. The lease confers on the lessee "the exclusive right of drilling and oper-

ating for petroleum and gas" on the plaintiff's land. If oil is found, the lessee covenants to pay a royalty of one-eighth of all oil produced, free of cost or expense, to the lessor. If gas is found in sufficient quantity to justify marketing it, he is to pay the sum of five hundred dollars per annum for each well. The right to divide the leasehold, and to sublet the parts into which it is divided, for oil purposes, is distinctly reserved by the lessee. There is no distinct covenant for putting down wells on the land except that which relates to the first, or experimental well, which was to determine the value of the land for oil purposes. But in a lease for oil purposes, a stipulation that other wells shall be put down, where the land is shown to be valuable for oil by the production of the first or test well, is not indispensable. The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, enter into the contemplation of both parties to such an agreement: *McKnight v. The Gas Co.*, 146 Pa. 185. It is an implied condition of every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent the lessee shall put down so many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. In determining when and where such wells shall be located regard must be had to the operations on adjoining lands, and to the well-known fact that a well will drain territory of much larger extent when the sand rock in which the oil or gas is found is of coarse and loose texture, than when it is of fine grain and compact character. Whatever ordinary knowledge and care would dictate as the proper thing to be done for the interest of both lessor and lessee under any given circumstances is that which the law requires to be done as an implied stipulation of the contract. If this was not so held it would be practicable to defeat the very purposes of the contract, and to drain from the land of the lessor the oil underlying it and yield him nothing in return. The reason why this doctrine is modified in its application to gas territory is plainly stated in *McKnight v. The Gas Co.*, *supra*. It is the difference in the manner of gathering and utilizing the product in gas and oil wells.

Turning now to the findings of fact made by the learned judge of the court below, we learn that the defendant has put down one well on the plaintiff's land about midway across the base line of the triangle and very close to the line of the Stewart. The rock there is very compact, and the well yields but four or five

barrels per day. He has put down two wells on the Garlach, finding a loose rock and good wells. He has finished one large well on the Stotler quite near to the top of the triangle and in a very porous rock. He has another in progress on the same tract not far from the base end of the perpendicular side of plaintiff's land. These wells show with a reasonable degree of certainty that the upper half of the Kleppner lot is over a coarse porous rock and is capable of furnishing one or more good wells. The location of the other wells referred to shows that this end of the Kleppner lot will in two or three years be completely drained by them; other persons will secure the royalties for his oil; and he will receive nothing whatever for the oil under the only valuable portion of his land. The findings further show that it is the expressed purpose of the defendant to secure Kleppner's oil through his wells on the Garlach and Stotler tracts of land. From the terms and purposes of the lease, from the nature and usages of the business to which it relates, and from the findings of fact to which we have referred, we draw the following conclusions of law:

First.—The lease contemplates the production of the oil underlying the Kleppner lot by means of operations conducted on its surface.

Second.—The number and location of the wells necessary to carry out the purposes of the contract is a subject belonging primarily to the lessee.

Third.—In disposing of this question, the lessee is bound to take into consideration the fact that his lessor is the owner of the oil, and to arrange and conduct his efforts to bring it to the surface in such manner as shall best protect the interests of both parties to the contract.

Fourth.—He is not bound to put down more wells than are reasonably necessary to obtain the oil of his lessor, nor to put down wells that will not be able to produce oil sufficient to justify the expenditure.

Fifth.—But that the oil may be obtained in time through other wells, on the lands of other owners, is not enough to excuse the lessee from his implied undertaking to operate the land for the best interests of both owner and operator.

In the main, the decree appealed from is justified by these legal conclusions. The operator has the right, as we have seen, to locate the well he is to put down; but we think the court below was justified in holding that the evidence afforded good ground for the belief that a paying well could be found on the upper end of the triangle, if so located as fairly to command the oil underlying the land. The defendant may think differently. If so, he may surrender all

of the land covered by his lease, except that naturally tributary to the well near the Stewart line. The conclusion that this well cannot reach and bring to the surface the oil in the loose rock under the other end of the plaintiff's land, but that the wells of the defendant, now down and in progress, on the Garlach and the Stotler lands, will do so, seems fully justified by the evidence. It is not found as a fact that these wells do now reach the plaintiff's, so as to draw from it. It is the fact that they may do so that gives the plaintiff his claim to present consideration. As bearing upon this general subject, the attention of the profession is called to *Janes v. Oil Co.*, 1 Penny. 242, and *Blair v. Peck*, *Id.* 247,—cases which are not to be found in the authorized reports.

We affirm the decree, with slight modifications, as follows: Upon consideration of the appeal from the decree of the Court of Common Pleas No. 2, of Allegheny county, made on the 23d December, 1895, it is ordered, adjudged and decreed that it is the duty of the defendant to proceed at once to drill and operate another oil well on the land of the plaintiff, described in the bill and the lease thereto attached, near the northern end of said piece of land.

It is further ordered that if the defendant does not, within ten days after notice of this decree, file in this case a declaration setting forth that he will put down another well on said land near the north end thereof and begin the same within twenty days thereafter, and prosecute the same to completion with all reasonable diligence and in good faith, his leasehold estate in said land shall be deemed to be abandoned except as to the well known as Kleppner No. 1 and a space of three hundred feet around it on all sides, and the right of way, etc., incident thereto.

It is further ordered that the defendant be enjoined from and after ten days after notice of this decree from exercising any authority or control over any portion of said land except that now designated as appurtenant to Kleppner well No. 1, and that he retire from and surrender the same to the plaintiff, unless the notice hereinbefore provided for be filed within the said ten days.

The record is now remitted that the court below may make such further order as may be necessary to give full effect to the above decree. The costs to be paid by the appellant.

MITCHELL, J., dissenting. A lessee who covenants to pay royalty on production is undoubtedly bound in good faith to make proper effort to develop the land. But while the in-

terests of the parties are the same in getting the largest production, yet in some respects they differ. The lessee has to bear the cost of putting down wells, and his interest is to proceed carefully, with due regard to expense and probable returns, while the lessor's interest is to have search and experiment, without regard to present cost. The decision in regard to such matters belongs primarily to the lessee. It is a proper subject for agreement, and, when the parties have agreed what shall be done, their rights are not subject to the judgment of any court to fix a different standard. If the parties to the present controversy had expressly stipulated that one well should be sufficient for the whole tract, no court would venture to enlarge the test by directing another to be put down at the lessee's expense; yet the covenant of the lease amounts to just that, as I understand the learned court below to admit. I would reverse this judgment, as a flagrant violation of the liberty and sanctity of contracts, by raising a purely factitious equity to enable the complainant now to make a better bargain, at the defendant's expense, than he chose or was able to make for himself at the time.

MERCANTILE LIBRARY HALL COMPANY v. PITTSBURGH LIBRARY ASSOCIATION.

In the absence of any by law or fixed practice in that regard, a notice of a meeting of the board of managers is insufficient, if not received by the members of the board before the morning of the day on which the meeting is to be.

A notice of a special meeting of the board of managers, stating that it was to hear the treasurer's report, and transact any other business which might come before the board, successors to the members of which were about to be elected, was insufficient, when the business actually transacted at the meeting included a perpetual lease, which involved the practical surrender of the active duties of the corporate trust.

A corporation formed to erect a building for the use of a library association was directed by its charter to lease the building, when erected, to the association, which was to pay to the company, annually, the amount of the necessary repairs and taxes, and in addition a sum not over 6 per cent. on the whole cost of the ground and building. *Held*, that the board of managers of the corporation had no authority to make a perpetual lease of the building to the association at a rent of 4 per cent. on its cost; the payment of the rent to be dependent on the surplus of income from rents after payment of taxes, repairs, and interest on encumbrances.

Appeal of the Mercantile Library Hall Company, complainant, from the decree of the Court of Common Pleas No. 1, of Allegheny county, dismissing complainant's bill against the Pittsburgh Library Association *et al.*

The case was referred to W. B. Rodgers, Esq., as master, who presented the following report:

"1 This is a bill filed by the Mercantile Library Hall Company against the Pittsburgh Library Association, Joseph Horne & Co., R. M. Gulick & Co., The Syria Temple, Joseph Albree, T. Brent Swearingen, Jas. F. Hudson and Wm. R. Thompson.

"The object of the bill was to set aside a perpetual lease made to the Library Association, of the ground and building of the Hall Company situate in this city, which lease was executed by Albree as president of the Hall Company, under the authority, real or pretended, of a resolution of the board of managers of that company. Albree, Hudson and Thompson were members of the board of managers of the Hall Company. Swearingen was president of the Library Association, and executed the lease for that company. Horne & Co., Gulick & Co. and the Syria Temple, were tenants of portions of the building.

"2 On the 12th day of February, 1849, an Act of Assembly was approved (P. L. 59) incorporating the Young Men's Mercantile Library and Mechanic's Institute of the city of Pittsburgh, the name was afterwards changed to that of the Pittsburgh Library Association, and that corporation is the real defendant in this case, and will be referred to hereafter as the Library Association. The object of the corporation, as stated in the act, was 'promoting and encouraging general information upon commerce, manufacture, and the mechanic and useful arts.'

"3. On the 18th day of March, 1859, an Act of Assembly was approved (P. L. 1860, p. 811) incorporating the Mercantile Library Hall Company, and that corporation is the plaintiff in this case, and will be referred to hereafter as the Hall Company. The object of the corporation, as stated in its act of incorporation, was to purchase land and erect thereon a suitable and commodious building for the use of the Library Association, the defendant, which building, with the ground on which it should be located, was, when ready for use, to be perpetually leased to the Library Association on terms and conditions defined in part, at least, by the act.

"4. On February 3, 1870 (P. L. 103) a supplement to the act incorporating the Hall Company was approved. Section 2 of the act provided that the Hall Company might lease the grounds and building to the Library Association on such terms and conditions as may be agreed upon between the respective corporations. Provided, that the rents and revenues received by the Library Association, in excess of the rent, taxes, interest, insurance and repairs shall be paid to the Hall Company to reimburse it for the cost of the ground and building, and pro-

vided, further, that if the Hall Company shall agree, the surplus, receipts and revenues, and the increase in dividends arising therefrom may be appropriated to the purchase of stock in the Hall Company. This act is stated in the bill, as a part of the charter of the Hall Company, and seems to have been accepted.

"5. The Hall Company erected a building as required by its act of incorporation, which building, from the time of its erection, has been occupied in part by the Library Association.

"No lease was made upon the completion of the building, as provided by the Act of 1859. It seems that the Library Association considered that it would be injudicious for it at that time to assume the obligations upon it in case such lease should be executed.

"An agreement between the two corporations, dated March 10, 1871, was then prepared and executed by the officers of each, a copy of this agreement, marked Exhibit A, is attached to defendant's answer.

"By this agreement, the Library Association declared that as the net revenues of the building did not amount to a sum sufficient to pay taxes, repairs and interest on cost, and as there was in addition to the funded debt a considerable floating debt, it was therefore injudicious for it to assume the obligations of the lease, and therefore declined to do so, and on its part the Hall Company expressed its acquiescence in these views, and its willingness to retain possession for the the purpose of better securing the final accomplishment of the design for the benefit of the Library Association.

"It was therefore agreed that the Hall Company should retain possession, for the benefit of the Library Association, for the term of ten years from January 15, 1871, or until such further time as the floating debt of the company shall have been paid and the annual rents and revenues of the building, in excess of the expenses, shall reach six per cent. per annum on the whole cost of the ground and building. The Hall Company was to keep an account of the receipts and expenditures, annually balance the accounts, and make no charge against the Library Association for any deficiency in the net amount of the revenues. There were also other provisions requiring the Hall Company to apply the revenues, in excess of expenses, to the payment of interest and the indebtedness of the company.

"The duty of the Hall Company was stated in general terms to 'in all respects manage the property with a view to the earliest possible accomplishment of the object contemplated in the charter of the company.' This agreement was

by its terms to be subject to ratification by the stockholders of the Hall Company, but that was never obtained nor asked. The Hall Company, however, continued in possession and control of the building, leasing that portion of the building not occupied by the Library Association, and receiving the rents.

"6. The cost of the ground and building was \$266,176.44, made up as follows:

Construction account, . . . \$234,176.44.

Ground, 32,000.00.

"Of the cost of the ground, \$2,000 was paid in cash, and remainder was secured by a purchase money mortgage for \$30,000, which is still unpaid. There was paid in on capital stock \$104,142, and the remainder of the cost of the building was paid by loans, nearly all, if not all, of which was represented by mortgages.

"At the time of the making of the agreement, there was a funded debt, including the purchase money mortgage of \$160,000, and at or about that date the bills payable account amounted to \$19,000 or \$20,000. There are two dates, January, 1877, and April, 1886, when there were no bills payable outstanding, although at others there were such bills outstanding. The only detailed statement from the books, as to receipt and expenses, is for the year 1889, and shows the receipts for rent to be \$24,541, and the expenses, including interest on the mortgage indebtedness, \$16,539.96, balance \$8,001.04.

"7. On January 2, 1891, a meeting of the board of directors of the Library Association was held, at which a proposition to be made in behalf of that association, to the Hall Company for a perpetual lease from the company to the association of the entire building, was adopted. This proposition, after reciting that the Library Association was desirous of obtaining possession and control of the building, offered to take a perpetual lease, as of January 1, 1891, of the building, and in consideration thereof pay all the taxes, insurance and necessary repairs, the interest on the mortgage indebtedness (\$180,000) and also \$5,000 per annum towards the extinction of the first mortgage (\$30,000), also an amount equal to four per cent. per annum upon the par value of the stock of the Hall Company (\$104,142), but until the extinguishment of the first mortgage, the four per cent. payment to depend upon the revenues realized, that is, that payment was only to be made if realized, and only to the extent realized from the rents and revenues, after making the other specified payments, the rents and revenues, over and above the rent, taxes, interest, insurance and repairs, to be paid as provided in the act incorporating the Hall Company and its supplements.

This proposition was presented to, and accepted by the board of directors of the Hall Company, on January 3, 1891, and, on the same day, the perpetual lease in controversy was executed by the president of both corporations and acknowledged. The lease followed the term of the proposition as given above, excepting in this, that it bound the Hall Company to pay the \$5,000 payment coming due, which, under the proposition and acceptance, should be paid by the Library Association. At a regular meeting of the stockholders of the Hall Company, held on the 5th of January, 1891, resolutions were adopted denying the authority of the board to authorize the making of the lease, and that of the president to make it, and authorizing the new board, then elected, to take the necessary steps to cancel the lease. This bill was then filed.

"8. Prior to the time at which the boards of the two corporations acted upon the proposition for lease, the officers of the Library Association were: T. Brent Swearingen, president; Jas. F. Hudson, Jos. Albree and Wm. R. Thompson, directors. The officers of the Hall Company were: Jos. Albree, president; L. H. Williams, treasurer; W. R. Thompson, secretary; Geo. I. Whitney, J. O. Brown, Henry Holdship and James F. Hudson, directors. There was a vacancy in the office of vice-president, and one vacancy in the directorship in the latter company. The control of the affairs of the Hall Company was, by the by-laws, placed in the president, vice-president, treasurer, secretary and five directors, and they, together, constituted 'the board of managers.' They were all required to be stockholders, and five members, all being notified, constituted a quorum.

"Hudson, Albree and Thompson were members of both boards. Hudson was not a stockholder in the Hall Company, but had been duly elected as a director, and it seems to represent stock which the Library Association held in the Hall Company. Thompson owned certain certificates, but was not a stockholder of record.

"At the meeting of the directors of the Library Association at which the proposition to lease was adopted, and before its adoption, Hudson, Thompson and Albree resigned as members of the Library Association board.

"The meeting of the managers of the Hall Company, at which the proposition to lease was accepted, was a special one, and held January 3, 1891, on the last business day of the term for which that board had been elected, although it was at first contemplated to hold the meeting some days earlier, but a later date was fixed in order to allow Mr. Williams more time to prepare his report as treasurer. The meeting was

called by Thompson, the secretary; the notices were dated January 2, were in writing, and were mailed on the 2d to all the members.

"The object of the meeting, as stated in the notices, was to hear the treasurer's report, and transact any other business which might come before the board.

"The meeting was attended by Albree, Hudson, Thompson, Holdship and Williams, and they constituted a quorum. After reading the treasurer's report the proposition to lease was presented, and after some discussion, participated in by Mr. Williams, it was put to vote, and adopted by the votes of Albree, Hudson, Thompson and Holdship; Mr. Williams protested against the meeting and declined to vote, but participated in the discussion.

"Notices of this meeting, as stated above, were mailed to all of the managers, but Whitney was at that time, and for some days previous, in New York, and did not have any personal knowledge of the meeting, prior to its being held, and would, if he had been present, have probably opposed the acceptance of the proposition.

"The by-laws are silent as to the notice to be given to meetings of the managers, and there seems to have been no rule of practice on the subject, there being but few meetings held, and they were not fully attended, although so far as there was any practice on the subject, notices were sent by mail, a day or two prior to the meetings.

"The managers were all well known business men of this city, and the place of meeting was convenient and central. Whitney's office was on Fourth avenue, and the notice of the meeting was received there.

"9. There was no fraud on the part of Albree, Hudson, Thompson or Swearingen."

Upon these facts the master reported as conclusions of law that while the general principle as to the power of a board of directors, is that they cannot do an act causing organic or fundamental changes in the character of existence of the corporation, being confined to the transaction of the ordinary corporate business, in this case, as the corporation had been expressly created to do what the board undertook to do, their action was within their powers; that the lease executed was a sufficient compliance with the terms prescribed by the Legislature; and if it varied from the contract as set out in the resolutions of the two corporations, could be reformed; that under the circumstances reasonable notice of the meeting was given to the directors of the Hall Company to justify the consideration and adoption of the resolutions as to the lease.

Exceptions to this report having been dismissed by the court below, complainant appealed, assigning as error, the action of the court in dismissing the exceptions.

For appellants, *Lyons, Sanderson & McKee and Knox & Reed.*

Contra, Watson & McCleave and A. M. Neeper.

Opinion by MITCHELL, J. Filed January 6, 1896.

This is a regrettable controversy between two corporations occupying to each other practically the position of trustee and *cestui que trust*, both having the same end and object in view, but differing in opinion as to the time and mode of accomplishment. By the action of the trustee's agent, its former board of managers, the *corpus* of the trust has been transferred to the hands and management of the *cestui que trust*, and while this result is in accord with the purpose of the trust, the trustee complains that it has been done without proper authority, and without due regard for the trustee's own rights and interests. We are obliged to say that this complaint is well founded.

The notice for the special meeting of the Hall Company at which this lease was authorized was insufficient both in time and in substance. It was dated and mailed to the members of the board on January 2, and called for a meeting on January 3, at four o'clock. There is no finding by the master as to the hour of mailing nor any evidence that the notices were received by the members before the morning of the day on which the meeting was fixed. *Prima facie* this was not a reasonable time. The managers are all reported as business men, who cannot be presumed to be ready to drop their own affairs and attend off-hand on such a notice. One full day in advance of the time fixed, is as little as the law could presume to be reasonable and in many cases that would be too short. The by-laws or the practice of the particular board could of course fix any time that should be agreed upon, but there is no by-law here, and no sufficient evidence of any practice to supply a rule. Albree, the president, says it was customary to give two or three days notice, and Thompson, the secretary, says that to the best of his knowledge two days notice was given in this instance, in which he is admittedly in error.

The notice further was insufficient in substance. It was for a special meeting, with a definite object named, "to hear the treasurer's report," and the few general words added "and transact any other business which may come before them." It was for a meeting on the last business day that the board would be in exist-

ence, prior to the election of their successors at the stockholders' meeting on the following Monday, and was calculated to convey the impression which Whitney says Williams complained of, that it was a formal meeting to pass on annual reports and similar matters of routine, prior to the approaching stockholders' meeting. In fact, however, it was called for business of the most important and most exceptional character, involving the practical surrender of the active duties of the corporate trust.

The meeting thus irregularly called was equally unfortunate in its attendance. The full board of managers consisted of the four principal officers of the Hall Company and five directors, making nine, of whom five were a quorum. By reason of two vacancies at that time there were only seven managers, one of whom, Whitney, did not get the notice in time, and another of whom, Brown, did not attend, for reasons not explained. This left an attendance of a bare quorum of five persons, of whom the master reports that one was not a stockholder, and therefore not legally qualified to be a director, and another was not a stockholder of record though he appears to have held some certificates. These two whose titles were at least questionable, and one other, making a majority of the quorum, knew all about the special business to be put through, for as directors of the Library Association they had been active in having the lease prepared by counsel, and adopted by the association at its meeting on the previous day. It is true that they had on that day resigned as directors of the Library Association, so that at the meeting of the Hall Company on the 3d they no longer technically occupied the positions of directors in both companies, but it cannot be pretended on the evidence that these resignations were not mere formalities in order better to carry out the plan of leasing which prior to such resignations the same persons in their other capacities had prepared. The practical result was that when the board of managers of the Hall Company met on January 3 to consider the lease thereof, three of the quorum present as representatives of the lessor, were already committed to the lease, in the interests of the lessee, and the vote of these three made the majority by which the lease was approved. The master finds that in this action there was no fraud in fact, and we see no reason to question the correctness of this finding. The gentlemen concerned had no pecuniary interest in the matter and were acting for the benefit of the Library Association, which as already said was the *cestui que trust* for which this building was originally designed, and to which it was ulti-

mately to go. But the mere statement of the facts is enough to show that the method of proceeding is open to most serious objection. By this it is not meant to be intimated that the same person may not legally and properly act as director in two corporations, even when dealing with each other. The interests of corporations are sometimes so interwoven that it is desirable to have joint representatives in their respective managements, and at any rate it is not uncommon and not unlawful practice. But the action of such persons should be open, and free from any suspicion of secret dealing in favor of one principal while acting as the representative of the other. Such action is always open to investigation, and the utmost good faith must not only exist but be made manifest. In the present case we are not required to say whether or not the transaction is so contrary to settled policy that it must be conclusively pronounced a fraud in law, as there are other grounds which are decisive. Before leaving this branch of the case, however, we may call attention to the difference in *Gloninger v. R. R. Co.*, 139 Pa. 13, cited by appellee, in that the issue of bonds in that case was for payment of an undisputed debt, and was authorized by a vote of the stockholders themselves.

But the lease in controversy here is fatally defective for want of authority in the board of managers to grant it. While the object of the incorporation of the Hall Company was to build a hall for the use of the Library Association, and to lease it and ultimately to convey it to that association, yet the Act of 1859 looked to the payment of the stockholders of the Hall Company, and defined with great precision the respective rights of all the parties, including the terms of the contemplated lease. The supplementary Act of 1870 relieved the stringency of the former act somewhat as to the terms of the lease, by authorizing it under certain restrictions to be made upon mutual agreement. But it made no substantial change in the rights of the stockholders, and it is not clear how it could have done so without their consent. The act, however, seems to have been acquiesced in, as a lease for ten years was made under its authority in 1871, and appears to have been lived under until the action that led to the present controversy in 1891. The present lease does not follow the terms of the Act of 1859. It is not necessary to go into the discussion of the variations further than to say that by the Act of 1859 the Library Association on taking possession under the lease provided for, was to pay to the Hall Company annually the necessary repairs and taxes, "and in addition thereto a sum not

over six per cent. per annum on the whole cost of said ground and building," while under the lease of 1891 the payment is to be four per cent. and that dependent on a surplus of income from rents, etc., after payment of taxes, repairs and interest on encumbrances. As these last are necessarily preferred claims, it may well be that the stockholders of the Hall Company would get a larger return under the lease, provided the Library Association is able to keep its covenants, than they would under their own management, but under the Act of 1859 they were entitled to keep the management of the property in their own hands until the terms of the act should be complied with, and this was a right of which they could not be deprived except by such compliance, or by their own consent. The lease in question surrenders the control of all the company's property, divests the company of all its active functions, and practically winds up its existence except for such formal continuance as may be necessary for the receipt and distribution among its stockholders of such payments as the Library Association shall hereafter make. Such an act is not in the management of the current affairs of the company, but is extraordinary and practically final. It cannot be fairly regarded as within the authority committed to the board of directors, but rather as an accepted completion of its corporate purpose and a consequent surrender of its property, franchises and rights which only the true owners themselves, the stockholders, were competent to make.

At the close of respondent's answer, there were some rather irregular averments that the objections of the present managers of the Hall Company, and the action of the majority of the stockholders, are for selfish aims, and with a view to their own profit rather than to the interests of the Library Association. These we understand to have been stricken out by the court below as impertinent, and they have not been considered as part of the case before us. They are mentioned now only to make this fact clear. The object of the Hall Company's corporate existence was to promote the interests of the Library Association. It is a trustee for that purpose and bound to act in the utmost good faith to that end. Should it at any time fail to do so, the courts of equity are open to the *cestui que trust* for redress, and this adjudication will not be in the way.

Decree reversed, bill reinstated and decree directed to be made restoring parties to their respective positions before the lease of January, 1891, was made, but saving intervening rights of tenants who have paid rents, and others.

District Court, United States.

Western District of Pennsylvania.

IN ADMIRALTY.

ULLERY et al. v. THE STEAMBOAT MAYFLOWER.

Where a libel was filed by members of a limited partnership against a vessel, formerly owned by the partnership and sold by warranty deed, it was dismissed on the ground that libellants had lost their lien by their own act.

Libellants had notice that the vessel was heavily in debt for money due on a mortgage and their services must have been done on the faith of the partnership and not on the security of the boat, and therefore they would have no lien on the boat.

No. 7 Oct. T., 1895.

Opinion by BUFFINGTON, J. Filed August 3, 1896.

W. H. Ullery and others file this libel against the steamboat Mayflower for services rendered on said vessel. The facts of the case are as follows: On April 19, 1894, W. H. Wilson, Frank A. Bailey, Thomas M. Reese and J. B. Sneathen, owners of the Mayflower, by an article of agreement signed by them on their own behalf and for the Mendelsohn Park Excursion and Amusement Company, Limited, by L. N. Clark, chairman, and Thomas A. Ingram, secretary, and sealed with the company seal, agreed to sell said vessel to said copartnership for fifteen thousand dollars. One thousand dollars of this sum was to be paid in hand and the balance secured by a marine mortgage. This mortgage was given and recorded. By this agreement the Mendelsohn Company covenanted "to pay all bills, wages and claims contracted for on account of, or charged to, said boat once each week," and also that "in default of any payment of interest or principal for a period of five (5) days after the same is due and payable by the terms hereof, or the violation of any single condition, covenant or agreement to be done and performed by said second party, then the right and privilege is granted to said parties of the first part by the party of the second part, to resume possession, control and ownership of said boat without resort to legal process, to obtain possession and ownership, and said party of the second part further agrees to execute a bill of sale retransferring said boat to said first parties for a breach of any one of said covenants, conditions or agreements, or default in paying interest or principal, or if said first parties proceed on their mortgage to recover possession, then said second party agrees to file no defense or claim for any part of said consideration which

may have been paid." The purchase money was not paid as it matured, but the company was allowed to run the boat until May 29, 1895. At this time considerable amounts of wages, extending far over the week contemplated in the agreement, were in arrear. On that day the boat was reconveyed by bill of sale to the original owners. This bill of sale was executed on behalf of the company by Lewis N. Clark, who signed as chairman and manager, and by George H. Lynch, one of libellants, who signed as secretary and manager. The company seal was attached and the instrument regularly acknowledged on June 3, 1895, and recorded the same day in the office of the Surveyor of Customs. It contained a clause of general warranty by which the Mendelsohn Company agreed "to warrant and defend the steamboat or vessel called the Mayflower, and all other before mentioned appurtenances against all and every person or persons whomsoever."

The vendee under this bill of sale took possession of the boat and sold her thereafter to James H. Reese, trustee, by agreement of sale with clause of warranty. Subsequent to said sale this libel was filed to recover for wages rendered during the time the vessel was operated by the Mendelsohn Company. In the libel James H. Reese, trustee, is expressly alleged to be her owner. He appeared, gave bond, procured the vessel's release and removed her from the jurisdiction of the court.

Subsequent to the filing of the libel the claims of all the libellants except four were paid. The costs were not paid and thereafter the case was proceeded in as to W. H. Ullery, who claimed \$98.23 for services as mate; George F. Dumbarger who claimed \$459 for services as engineer; Thomas F. Dunlevy, who claimed \$80 for services as pilot; George H. Lynch who claimed \$60.12 for services as clerk. The four claims were contested on the ground that libellants, being members of the limited partnership when they rendered their services and when the boat was sold, could not, under the facts of this case, maintain a lien against her. The libellants contend the bill of sale by which the vessel was retransferred to the original owners was not executed by the authority of the company and did not convey the title to the boat. There is no evidence that Clark was not a manager and chairman of the company. Lynch swears he was not an officer. The paper shows that he signed it as one, and he does not deny the statement of Thomas M. Reese that he was represented as one at the time. There is no proof that the vendee under the bill of sale knew of his lack of authority. If, however, the paper

was voidable on that account, libellants have taken no steps or has the company to repudiate the acts of the persons executing it, and they have positively affirmed them by filing their libel against the vessel and expressly recognizing and averring Reese to be the owner as we have seen. In addition thereto it will be noted that by the instrument by which the company purchased the vessel, provision was made for the retransfer to the vendors in case of the non-payment of the purchase money. Whether authorized or not, the persons signing, and who were in charge of the boat, seem to have done no more than the company was obligated to do. For present purpose we must regard the vessel as having been properly retransferred to the original owners and by them to James H. Reese. Under these facts can the libellants maintain their liens? After careful examination we are of opinion they cannot. What might have been the rights of these libellants as against a limited partnership, of which they were members, to acquire a lien, is not the question before us, and upon it we express no opinion. Here the rights of third parties had intervened. In the very instrument by which alone the company acquired any claim to the boat, it covenanted to pay all wages contracted for or charged to the boat once each week. Will a court proceeding on equitable principles permit members of that partnership, in violation of the company's covenant, to fasten upon the vessel as against these covenantees, a liability extending over months? The very statement of the facts is a refutation of the claim. But this case goes further; when the vessel was reconveyed to the original vendors for non-payment of the purchase money as provided in the instrument by which the company originally took title, a covenant of general warranty was given. Certainly this case comes within the spirit of what Mr. Justice GRIER said in *Gallatin v. The Pilot*, 2 Wallace, 592: "A sale by the sheriff confers all the title which the defendants in the execution have, and is equivalent to their own deed with special warranty. The case, then, presents this bare proposition: can a vendor for a consideration paid, retain a lien against property which he has thus sold and delivered, in the hands of his vendee; and that, too, for a debt due by himself to himself? Certainly he cannot, for where a chattel is sold and delivered to the vendee, the vendor has neither *jus in re* nor *ad rem*; neither property in or lien on the thing sold. Admitting there was as between the partners a balance in favor of the libellants and that it would have a lien *inter sese*, how could we retain such a lien on a boat sold by

themselves with special warranty?" In the present case the purchasers of the boat from the company were mortgage creditors, and while the transaction was in form a sale in substance its purpose was to extinguish and wipe out the mortgage debt. This debt was in existence before libellants' service was performed. Both by its record and its recital in the conveyance of the vessel, the members of the company had notice of its existence before they performed any part of the work sued for in this libel. Such being the case it would be inequitable to permit the partners as individuals to wipe out the mortgage or acquire a lien prior to it for services subsequently performed. In addition to this it is to be noted that the facts of this case tend to show the work was done on the faith of the partnership rather than on the security of the boat. Libellants had notice that the boat itself was heavily in debt and must have realized that with the large mortgage upon her they must rely, not on the mortgaged boat but on the successful operation of the partnership for payment of their wages.

On the whole we are of opinion the work was not done on the credit of the boat, and on this account, if other reasons were necessary, the libel could not be sustained: *The St. Joseph*, 21 Fed. Cases, case No. 12,229, Brown's Adm., 202; *The Benton*, 3 Fed. Cases, No. 1334. The libel was confessedly proper as to some of the libellants who were afterwards paid and would have carried costs.

Under the circumstances a decree will be entered against the respondents for costs.

For libellants, *Geo. W. Acklin*.

For respondents, *S. C. McCandless*.

Court of Common Pleas No. 3.

CLAYBOURN et al. v. ALLEGHENY HEATING COMPANY.

Seven different plaintiffs sue a gas company for damages caused by an explosion and obtain verdicts. One case is appealable to the Supreme Court and the balance to the Superior Court. The verdicts are acceptable to the defendant if anything can be recovered. The court requires defendant's counsel to stipulate that the other cases shall be held pending an appeal to the Supreme Court on the one case appealable to that court.

Nos. 409, 410, 411, 412 and 422 May T., 1895, and Nos. 24 and 639 Aug. T., 1895. Motion for new trial.

Opinion by McCLUNG, J. Filed June 27, 1896.

These seven cases, all arising out of the same

accident, the defendant the same in all, but having seven distinct plaintiffs, were tried together.

Plaintiffs' counsel consented to this method of trial, but did so under considerable pressure on the part of the court. Each plaintiff received a verdict, but the amounts of the verdicts are admittedly small.

It is urged upon us that they are inadequate, and that this results from the fact that a separate trial was not given in the case of each plaintiff. We are disposed to think that there is a good deal in this claim of the plaintiffs. We are thoroughly convinced that, at all events, it would be unjust to plaintiffs to leave it within the power of the defendant to obtain any further advantage from the method of trial. Our attention is called to the fact that, in some of the cases, the writ of error will be to the Supreme Court, and in others to the Superior Court. Counsel for defendant candidly admits that he does not desire a reversal unless he can get it without a *venire*.

When one case is decided by the Supreme Court he will know the fate of the others in advance and can if he so desires discontinue the other writs, in case of a reversal with a *venire*. At all events he can do this with respect to the cases in the Superior Court.

Counsel for defendant may choose any one of the cases within the jurisdiction of the Supreme Court as a test case. We will then refuse a new trial in that case, and allow judgment to be entered upon defendant filing a stipulation to the effect, that the other cases shall be held until this one is decided by the Supreme Court, and that in case of a reversal new trials shall be awarded in all the cases.

If defendant does not assent to this and file the stipulation within one week from the filing of this opinion, we will grant new trials in all the cases.

For plaintiffs, *Young & Trent*.

For defendant, *Wm. M. Hall, Jr.*

—The intoxication and misbehavior of a passenger which authorizes his expulsion from a train is held, in *Louisville & N. R. Co. v. Johnson* (Ala.) 31 L. R. A. 372, to constitute no excuse for ejecting him at night at a place from which he can escape only by following the roughly ballasted railroad track and crossing a cattle-guard on one side or a bridge on the other. The extent of his intoxication, and the conductor's knowledge of it, and the safety of the place of ejection, are held to be questions for the jury.

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No. 4.

PITTSBURGH, PA., AUGUST 19, 1896.

Supreme Court, Penn'a.

WILLIS et al. v. FINLEY.

A check received after three P. M. was deposited for collection the same day in a bank not a member of the clearing-house. The next morning it was deposited in the bank or through which the collecting bank cleared, and the day following it was presented by that bank through the clearing-house to the bank on which it was drawn and was not paid, the bank failing that day. *Held*, that due diligence was used in presenting the check.

Appeal of William P. Willis and John Sidons, doing business as W. P. Willis & Co., plaintiffs, in an action of *assumpsit* brought against T. M. Finley, to recover the amount of an unpaid check.

At the trial it appears that in the latter part of November, 1893, W. P. Willis & Co., appellants, of the city of New York, placed in the hands of A. C. Johnston, their attorney, of this city, for collection, an account against F. M. Finley, the appellee, amounting to \$475, in payment of which, on the 12th day of December, 1893, he received from Mr. Finley, through his attorney, A. C. Spindler, Esq., a check for that amount, drawn upon the banking firm of R. Patrick & Co., of this city. This check was delivered to Mr. Johnston after 3 o'clock P. M. on the 12th, and was deposited by him for collection in the Anchor Savings Bank about 3:30 P. M. on the same day, by which it was sent to the First National Bank immediately after 9 o'clock A. M. on the 13th, and by the latter bank it was presented in the clearing-house on the morning of the 14th of December. On that date R. Patrick & Co. suspended payment, and the check was returned through the Anchor Bank to Mr. Johnston, unpaid, who thereupon brought suit upon the original account against Finley, to which an affidavit of defense was filed averring payment of the account, the real basis of which was that the check had not been presented in due time at the bank of Patrick & Co., and by reason of the negligence or want of diligence on the part of the payee Mr. Finley was discharged from liability. It appears that the Anchor Savings Bank was the only bank in the city of Pittsburgh that remains open after 3 o'clock

P. M., and, not being a member of the clearing-house, it made its collection through the First National Bank, a member of that institution. The clearing-house was from 9 o'clock A. M. until 12 o'clock M. of each day, and, according to the testimony of the representatives of the banks, the clearing-house list is made up each day about 8 o'clock P. M. for the following day; and when this check was received by the First National Bank, on the morning of the 13th, it was placed necessarily on the list for the 14th, which was in exact accord with the custom and usage of all the banks in the clearing-house association. When this check was delivered to the payee, Patrick & Co. had closed for the day, and it was impossible either for him or the Anchor Bank, with whom he deposited, to present it until the following day.

For appellant, *A. C. Johnston.*

Contra, Alvin C. Spindler.

Opinion by STERRETT, C. J. Filed January 6, 1896.

The undisputed facts of this case bring it within the principles of *Loux v. Fox*, 171 Pa. 190. For reasons given in that case, we think due diligence was exercised in presenting the check in question for payment, and hence the learned court erred in directing a verdict for the defendant. There appears to be nothing in the case that requires extended comment.

Judgment reversed and a venire facias de novo awarded.

COMMONWEALTH ex rel. W. P. BIGLEY et al.
v. HONORABLES THOMAS EWING, J. W. F.
WHITE and CHRISTOPHER MAGEE, Judges
of Common Pleas No. 2, of Allegheny County.

Riparian owners on the Allegheny river obtained a decree in equity requiring the defendants to remove certain flat boats from in front of the property within sixty days and enjoining them from maintaining them there. A *præcipe* for appeal was filed and a recognizance given in \$500, conditioned for the payment of costs only. The court below refused to approve the recognizance and directed that before defendants' appeal should act as a supersedeas they should give a recognizance in \$2,000, conditioned for payment of "damages" as well as costs, because the defendants persisted in maintaining the nuisance. *Held*, that this was proper under Act of 17th March, 1845, § 4; that the word "damages" is equivalent to the words of the condition of the act, which are that the "appellant will pay the value of the use and occupation of such property from the time of such appeal until the delivery of the possession thereof," etc.

Demurrer *sur* answer to petition for alternative *mandamus*.

The facts are stated in the opinion of the Supreme Court, *infra*.

For petitioners, *Alexander Simpson, Jr., A. H. Mercer and S. S. Roberston.*

For respondents, *J. J. Miller and Shiras & Dickey.*

Opinion by DEAN, J. Filed July 15, 1896.

S. Jarvis Adams filed a bill in equity in the court below against these relators and others, doing business as the Ireland Sand Company, as defendants, in which he averred he was the owner of a lot in the Ninth ward of the city of Pittsburgh, fronting on the Allegheny river two hundred and three feet, and that as riparian owner, he was entitled to the unobstructed frontage, subject to the rights of the Commonwealth and the United States on the river; that he was an iron manufacturer, and the frontage was valuable to him as a boat landing; that defendants, without authority, persisted in maintaining a flat boat of large dimensions at the river front of his lot, and had attached the same to his land; that to this flat boat defendants moored large barges loaded with sand, manure and other freightage, which in conducting their business they load and unload, thus obstructing him in access to the water from his lot, and causing him great damage; he therefore prayed, that defendants be enjoined from so occupying and using the water frontage of his lot.

To this, defendants answered, in substance, denying the riparian right of plaintiff by reason of his ownership of the lot, but admitting that Sarah Bigley, one of defendants, occupied the river front and transacted business thereon without authority from plaintiff, and averring that he having no right, could exact no rental; and further averring, the use made by Sarah Bigley of the water front was lawful.

The Shoenberger Steel Company, claiming to own eight hundred feet on the river, also filed a bill against the same defendants, setting out the same complaint, and praying for like relief, to which the same answer was filed.

The case came on for hearing before Judge EWING in the court below, sitting in equity, who found in favor of the plaintiffs, both as to the facts and law. Accordingly, on the 23d of December, 1895, it was decreed, that W. P. Bigley and Sarah E. Bigley, two of defendants, and these relator plaintiffs, be required to remove the flat boat within sixty days, and further, be enjoined from maintaining the same in front of the lots.

On the 10th of January, 1896, before the expiration of the sixty days, the defendants, against whom the decree was entered, filed *pro-cipe* for appeal to this court, entering recognizance in each case with good securities in the

sum of \$500, conditioned for payment of costs only, with proper affidavit. The next day, the recognizances were tendered to Judge WHITE for approval; he refused to approve them, but directed, that before defendants' appeal should operate as a supersedeas, they should enter into recognizance in sum of \$2,000, conditioned for payment of damages as well as costs, and stating, apparently, as the reason for enlarging the penalty in the bond, that defendants persisted in continuing the nuisance.

The defendants then presented their petition to this court, averring a belief in their right to an appeal on giving bond for costs, and alleging it to be the duty of the judge to approve the same in the form tendered, and praying for *mandamus* to the judges of the court below, these respondents, directing the approval of the \$500 recognizances. On the 12th of February, 1896, we awarded an alternative *mandamus*. To this, return was made by Judge WHITE, in part as follows:

"At the trial of said cases, it was clearly proven that the plaintiffs in the two cases had large iron establishments on the banks of the Allegheny river, with titles extending to said river; Adams on the lower side of a street running to the river, and the steel company on the upper side, their lands abutting on the street; that the defendants had a large float or flat boat, opposite the mouth of the street, and extending a considerable distance above and below, in front of plaintiffs' properties; that this float was fastened to stakes in the banks of the plaintiffs' properties, and had a board passage way to the street, used by teams for hauling coal, sand and other materials to and from the float; that they had an office on said float, and also stable or shed where they kept their horses or mules; that in addition to the float the defendants had always barges or boats tied to their float, bringing and taking away material, and these always seriously interfered with the plaintiffs' land, and sometimes entirely obstructed the landing in front of plaintiffs' properties, and entirely at all times prevented them from any landing at the street; that the defendants for some years had used their float and barges as a regular place of business for delivering coal and sand in the city, and for collecting and shipping manure, and greatly to the injury of the plaintiffs in their business. One great source of damage was the accumulation of river drift at the float, which obstructed the influent pipes to plaintiffs' works, causing delay and expense, and which, if continued, might stop the works for awhile, most disastrously to plaintiffs' business.

"When the bonds were presented in court

for approval, the defendants' counsel stated they would not remove the obstructions, but would continue the business and resist the plaintiffs' claim so long as it was possible to litigate it.

"If bail for costs will be a supersedeas, the defendants will continue the obstructions to the great damage of the plaintiffs. They may entirely exclude the plaintiffs from all access to the river. And in the end, when damages shall be assessed, the plaintiffs in all likelihood will not be able to recover one cent.

"Under these facts and circumstances, I thought the defendants should give bail for more than the costs, enough at least to cover the probable damages the plaintiff would suffer from a continuance of the obstructions. If I was wrong in this, on an intimation to that effect from the Supreme Court, the bonds heretofore presented will be at once approved."

To this return, the petitioners demurred, as insufficient for a number of reasons, but the only one which we deem it necessary to notice is the sixth, as follows: "Because nothing in said return contained excuses respondents from the legal duty of approving the bonds offered on the appeals in view of the admitted facts that they were ample in amount and proper in character to cover all costs which had accrued and were likely to accrue in said causes."

The other reasons involve dispute as to the facts, and their sufficiency to move the discretion of the judge in determining the form and substance of his decree.

If the discretion was reposed in him by law, to exact a recognizance greater in amount than \$500, and which should embrace damages as well as costs, a gross abuse of that discretion, of which here there is not the semblance, would have to be manifest before we would inquire into it.

The only question is whether the learned judge of the court below was mistaken as to his power to enlarge the penalty in the bond so as to cover damages.

The right of plaintiffs in the equity cases, both by bill, answer and proofs, turned wholly on the extent of their riparian rights as owners of the lots to which defendants moored their flat boat. The court found as facts: There was no street along the river between the river and the lots; that Fourteenth street is forty feet wide, and led to the river between the lot of Adams on one side and the Shoenberger Steel Company on the other; that defendants' boat was 170 feet long, and extended across the street and along the front of each property, and by so placing it, the plaintiffs were deprived of the possession and enjoyment of their lots; that they had, as ripar-

ian owners of these lots, and as against defendants, the exclusive right to such possession. Clearly, the subject of litigation was the right to real property. We do not, in this proceeding, pass on the finding of facts by the learned judge of the court below, nor do we review his conclusions of law; the time for that is on the hearing of the appeal. What we do determine, is, that manifestly from the pleadings, proofs and decree, the controversy was over the possession of real property. The effect of the execution of the decree is to oust these defendants from what the court found to be a defiant, wrongful possession of this realty, and to cause a redelivery of such possession to plaintiffs. The petitioners ask, that this order be stayed pending the appeal; their case then comes under the fourth condition of the Act of 17th of March, 1845. That condition reads thus:

"4. If the decree or order appealed from direct the sale or delivery of the possession of any real property, the issuing and execution of process to enforce the same, shall not be stayed until a bond be given with sureties as herein before directed, in such penalty as the Court of Common Pleas shall deem sufficient, conditioned that during the possession of such real property by such appellant, he will not commit or suffer any waste to be committed thereon; and in case such appeal be dismissed or discontinued, or such order or decree be affirmed, such appellant will pay the value of the use and occupation of such property, from the time of such appeal, until the delivery of the possession thereof, pursuant to such order or decree."

The reasons given for exacting the additional amount, by the learned judge of the court below, as heretofore quoted, are covered by the words of this condition; therefore he did not exceed the power the act conferred. If he had directed the condition of the bond to be for the value and occupation by defendants of plaintiffs' property pending the appeal, as is the language of the act, as well as for costs, it would only have expressed the same thought, as "damages" to plaintiffs from the possession by defendants of the property during the same interval. The demurrer is overruled, and the judgment entered for respondents.

JACOBY v. McMAHON.

In November, 1884, after unsuccessful attempts to sell a piece of real estate at public sale, under the Act of March 29, 1882, P. L. 180, to pay debts of a decedent, not of record, the Orphans' Court authorized a private sale of the property. The administrator made conveyance, the purchaser went into possession and so remained for nearly eight years when a son of the decedent brought an ejectment on the ground that the ad-

ministrator had no right to sell for payment of debts other than at public sale, and the Orphans' Court could give no power to make a sale not authorized by the statute.

Held, that the heir having been cited by his guardian to appear in court and make objection, and not having done so, it is too late eight years afterwards to take advantage of the blunder of the court.

Appeal of Owen McMahon, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of ejectment brought by Walter Jacoby, by his next friend, to recover a lot of ground in the 14th ward of the city of Pittsburgh.

For appellant, *W. L. Merwin*.

Contra, *Geo. W. Acklin* and *J. L. Ritchey*.

Opinion by DEAN, J. Filed March 2, 1896.

This action was an ejectment for a lot of ground in Fourteenth ward of the city of Pittsburgh. The father of plaintiff, Christopher R. Jacoby, purchased the lot by deed, October 23, 1872, from Charles Meyran, and executed to Meyran a mortgage, which was duly recorded, for \$670 of the purchase money. Two hundred and ninety dollars of mortgage remained unpaid at Jacoby's death, intestate, 20th January, 1879. Letters of administration on his estate were taken out by James Hindley, and he on 18th January, 1884, presented his petition to the Orphans' Court of Allegheny county for leave to sell the lot and other real estate for payment of debts; among the last, the balance due on the mortgage. The petition, schedule of debts, and appraisal of personal property were all regular and properly verified. Thereupon a citation was awarded, directed to his widow, to the guardian of his only child, the plaintiff, and to Meyran, the mortgagee, to appear and show cause why the prayer should not be granted. Proof of service was had on all the parties, and no objection made. Thereupon the court, by formal decree of February 2, 1884, ordered the administrator to sell the lot at public sale for cash, discharged from the lien of the mortgage, and make return of the sale. On April 19th, following, on application of the administrator, the court modified the order, and directed that the lot be sold subject to the lien of the mortgage. On May 31st, following, the administrator made return that he had offered the lot for public sale on the premises, but, failing to obtain an adequate bid, asked that the time for making sale be extended until 12th of July, following. The court entered an order that the time be extended as prayed for. The administrator again presented his petition, stating no bidder had appeared, and, owing to neglect of the bill-poster, legal notice had not been given.

He therefore prayed for another extension. Thereupon, July 12th, the court directed an *alias* order of sale, returnable 9th of August, following. To this order the administrator made return that he had offered the property at public sale on 9th of August, after due notice according to law, but no bids were made, except a friendly one of \$400 by his attorney, to save the property from sacrifice; that he has, by much exertion, secured a purchaser at private sale, Owen McMahon, who offers the sum of \$425, which offer he will accept, if approved by the court; that in his opinion it is a higher and better price than can be obtained at public sale. He therefore prays the court to confirm the sale and authorize him to convey the lot to McMahon. Thereupon the court made this decree:

"And now, November 24, 1884, the foregoing report and petition having been presented in open court, and it appearing to the court that there are debts not of record, upon consideration thereof, the court being of opinion that it is for the best interest of the estate and all concerned, do order, adjudge, and decree that the said James Hindley, administrator of C. R. Jacoby, sell and convey the said lot of ground, as in foregoing proceedings more fully described, to the said Owen F. McMahon, and make and execute a deed therefor, in fee, upon payment by him to Chas. Meyran, mortgage creditor, of the sum of \$290.58, and of the sum of \$184.42, being balance of consideration money, into court for distribution.

PER CURIAM."

"Received, November 25, 1884, from Owen F. McMahon, the sum of \$184.42, being purchase money paid into court as per above order, which sum, less my coms. of \$1.34, I have deposited in Iron City National Bank, subject to the further order of this court. PHILIP HOERR, Clerk.

Amount,	\$184 42
Deduct coms.,	1 34

Dep., \$183 08."

McMahon paid off the balance of the mortgage,—making, with the money paid into court, the full amount of the purchase money,—and the administrator made a formal conveyance to him of the lot. He went into possession, and so remained until May 6, 1892,—a period of nearly eight years,—when this plaintiff, son of intestate, brought this ejectment.

It was claimed at the trial the administrator had no authority to sell the lot for payment of debts at other than a public sale, and the Orphans' Court could give no power to make a sale not authorized by the statute. The learned judge of the court below so held, on the authority of *Spencer v. Jones*, 114 Pa. 618.

The sale was under the Act of March 29, 1882, P. L. 190, for payment of debts; and by no possible construction can the Act of 1853, known as the "Price Act," be made to cover the irregularity, or stamp the decree of the court as a ratification. It could not ratify that which it had no power to authorize. But will this plaintiff now be permitted to object to the proceeding? McMahon, the purchaser, paid his money, and there is no intimation it was not a full price. He paid on a formal decree of the Orphans' Court. True, he was bound to know better; that is, know the law better than the court which authorized and confirmed the sale. Still his case appeals strongly to a sense of justice; for, as is said in *Maples v. Kussart*, 53 Pa. 348, "It is a maxim of common honesty, as well as of law, that a party cannot have the price of land sold, and the land itself." This \$425 was applied in payment of the father's debts, and thereby relieved the land of the son in Fayette county. By his guardian he was cited to appear in court and make any objection he might have to the sale for payment of debts. Presumptively, he was in court at the date of every decree, and when this unauthorized order was made. He made no objection, and indirectly benefits by the blunder of the court. Eight years afterwards he appears in another court, and objects because the manner of sale was unauthorized. It is too late. If this sale had not been made with formal notice to him, through his guardian, or if the purchase money had not inured to his benefit, the palpable hardship to the purchaser would not, of itself, have moved us to so decide.

We think defendant's written point, "that under all the evidence the verdict should be for the defendant," should not have been refused. As the refusal is now assigned for error, this assignment is sustained, and

The judgment is reversed.

SNODGRASS v. CARNEGIE STEEL CO.

An employee injured by an explosion of a boiler cannot recover without showing by affirmative testimony that the explosion was one for which the defendant was liable.

Evidence that plaintiff told one of defendant's officers that the man in charge of the boiler was incompetent is insufficient to show that he was incompetent, and that he was retained in defendant's employ with knowledge of his incompetency.

Testimony by plaintiff that he told defendant's manager that the employee was incompetent, when contradicted by the testimony of the manager himself, will not sustain a verdict for plaintiff on the ground of defendant's knowledge of such incompetency.

Appeal of The Carnegie Steel Company, defendant, from the judgment of the Court of Com-

mon Pleas No. 2, of Allegheny county, in favor of John Snodgrass, plaintiff, in an action of trespass brought to recover for injuries suffered by the plaintiff, who was employed by the defendant, through the bursting of boilers caused by the alleged negligence of a fellow employee.

On the trial, before MAGEE, J., the following facts appeared: In the summer of 1892, a strike occurred amongst the employees of the defendant, at Homestead, and the military was called out to protect the defendant's works: Early in August the plaintiff was employed as an engineer to take charge of certain boilers. About the same time a man named Snyder was employed, also as an engineer to take charge of the same boilers, turn and turn about with the plaintiff. On the 29th of August, 1892, after the plaintiff had gone off duty and while the boilers were in charge of Snyder, they exploded and the plaintiff was scalded. The plaintiff testified that prior to the accident he had at least three times complained to William F. Bailey, the chief engineer of the works, about the incompetency of Snyder, that Bailey admitted the incompetency of Snyder and promised to get another man in Snyder's place; that plaintiff could not leave the mill-yard because a pass was required to get through the guards and soldiers posted about the mills, and Bailey refused to give him this pass; that he complained because Snyder permitted the water to get too low or too high and the blowing of the whistle kept him awake when Snyder was on duty, and because he thought Snyder would injure or burn the boilers.

A witness named Goldstein testified that Bailey admitted that Snyder was drinking too much. Bailey denied that he had made the admissions alleged, and said that he had never seen Snyder under the influence of liquor and that he had no reason to believe him incompetent, and further denied that he had been asked for a pass by the plaintiff.

Defendant submitted, *inter alia*, these points, which, with their answers, were as follows:

1. There being no evidence in this case as to the cause of the accident, the verdict must be for the defendant.

This is refused; I decline to say that. (Fourth assignment of error.)

2. There being no evidence in this case that the accident resulted from any negligent act or omission on the part of Frank Snyder, the verdict must be for the defendant.

This point is refused. I decline to affirm that; it is a question of fact. In other words, I leave it as a question of fact to be determined by you, whether or not there was any act or omission on the part of Frank Snyder from which

accident resulted. (Fifth assignment of error.)

4. That under all the evidence in the case the verdict must be for the defendant.

Of course, if I affirm that I would be taking it from the jury altogether. This point is refused. (Sixth assignment of error.)

Verdict for plaintiff \$4,500 and judgment thereon. The defendant appealed, filing, *inter alia*, the above indicated assignments of error.

For appellants, *Knox & Reed, Gibson D. Packer and Edwin W. Smith.*

Contra, Thomas M. Marshall and Rody P. Marshall.

Opinion by GREEN, J. Filed January 13, 1896.

The solitary ground upon which it is claimed that the defendant was liable in damages for the plaintiff's injury, is that the defendant was guilty of negligence in employing a fellow servant by whose negligence the injury was occasioned. This makes it necessary to inquire for a moment what is the law in regard to this kind of liability. The rule of law on that subject is very clear and altogether unquestioned. It is thus expressed in the case of *Fraser v. The Pa. R. R. Co.*, 38 Pa. 104: "The fundamental averment here is, that it was because of the carelessness of the conductor that the brakeman was injured, and in order to show that the company was responsible for this, it is averred that they were in fault in knowingly or negligently employing a careless conductor. * * * The question of character thus became an important one, and we are constrained to say that it was tried on improper evidence. Character for care, skill and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation and not by special acts. The reasons for this have been so often given that we need not repeat them: 1 Greenl. Ev. §§ 481-9; 7 Casey, 67. Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. * * * Besides this ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary."

In *Ardesco Oil Co. v. Gibson*, 63 Pa. 146, SHARSWOOD, J., delivering the opinion, says: "There is no difference between liability to a stranger and to a servant for a man's own negligence or want of skill; though a master is not responsible for an injury to a servant by the negligence of a fellow servant, unless he has failed in ordinary care in the employment of the culpable party," citing a number of authorities.

In *Mansfield Coal, etc., Co. v. McEnergy*, 91 Pa.

185, Mr. Justice PAXSON, delivering the opinion, said: "The deceased having lost his life by the giving away of defendant's bridge, over which he was passing at the time with a mule team, it was a necessary part of the plaintiff's case to show that the bridge had not been properly constructed. The defense was that the defendant had not exercised ordinary skill and care in the selection of employees to construct it.

The defense is ample if made out. * * * The defendants showed and it was not disputed that they employed Henry Willard to construct this bridge, and that he was a carpenter and bridge builder of experience. It is not enough for the plaintiff to show that his work was unskillfully done or that he was incompetent. It must appear that the defendants were guilty of negligence in selecting him; that they either knew he was incompetent, or with proper diligence might, or ought, to have known it. The law presumes they exercised ordinary care and skill in making the selection. The defendants are as much entitled to this presumption as the plaintiffs are to the presumption that the deceased exercised ordinary care in crossing the bridge. It will not do to have all the presumption on one side. It follows that the burden of proof of showing that the defendant did not exercise ordinary care and skill in the employment of Mr. Willard rests upon those who assert it;" citing many cases. It is unnecessary to extend the citations. The law as above stated is unquestioned.

It is only necessary now to recur to the testimony in order to determine whether it conforms with the requirements established by the foregoing decisions. The writer has read the whole of the testimony delivered on the trial with the utmost care, and is obliged to say that it utterly fails to establish a single condition of liability in this class of cases. There is absolutely no evidence in the cause that the defendant employed an incompetent person, whose negligence caused the plaintiff's injury, either knowing or having any reason to know, the fact of his incompetency. The theory of the plaintiff's case is, that he was injured by escaping steam from a boiler in the defendant's works which exploded, and that the explosion was the result of the negligence of one Snyder, who was a fellow servant with the plaintiff in attending the boilers in the boiler-house of the defendant. They were both engaged in the same service, twelve hours each out of twenty-four, and the particular service was keeping the boilers properly supplied with water at all times. The explosion took place about one o'clock in the day while Snyder was on duty, Snodgrass, the plaintiff, having gone

off at twelve o'clock, one hour before. In order that the plaintiff might recover against this defendant he was bound to show by affirmative testimony, (1) that the explosion was the result of some negligent act or omission of the fellow servant Snyder; (2) that Snyder was an incompetent servant for the duty he had to perform, and (3) that the fact of his incompetency was known to the defendant when he was employed by means of his having a reputation for incompetency or by acquiring a knowledge of it during his employment and before the accident.

The first difficulty with the plaintiff's case is that he entirely fails to prove that the explosion was the result of any negligent act or omission of the fellow servant Snyder. At the end of plaintiff's testimony there was no evidence to prove what was the cause of the explosion. The plaintiff did not give, or attempt to give, any evidence on that subject. The fact of the explosion was proved and the injury to the plaintiff, but no witness was examined and no testimony was given or offered, to show the cause of the explosion. Of course boiler explosions may occur from different causes. Defective material, over-burning weak parts of the boiler, so as to cause attenuation of the plates, over-heating by the person in attendance before the fellow servant went on duty, an insufficient supply of water to the proper elevation indicated by the gauge-cocks, and a sudden inpouring of cold water on the heated plates, all these were testified to as causes which might produce explosions. But out of them all there was only one for which the fellow servant in charge at the time of the explosion would be responsible, and that is the omission to maintain a proper elevation in the boilers. On that subject there was not a particle of testimony in the cause. The only witness who was examined on the subject of the cause of the explosion, was W. F. Bailey, the man who had charge of this part of the work. He was asked on cross-examination what caused the boiler to explode and replied that there were different causes that might have occurred, explaining them. He added, "Well, I am under the impression we were short of water in the boilers. Still, as I say, that sheet might have been heated on the turn before this man came on and that the great heat that was in there and the pressure of steam still in that boiler would draw that sheet until it would stand no longer and get very thin, and then, if they get a little more pressure on the boiler than what there had been before that, it might have let go." He was asked, "Q. In your opinion it was the want of water that caused that boiler to blow up? A. I won't

say positively; there was at one time; but I wouldn't say it was at the time it let go; there was a great deal of water came out of it at the time it let go." After saying that the flues were not collapsed and that not a rivet was put in them when the boiler was repaired, he was asked, "Q. You don't know what caused that boiler to explode? A. No, sir; not positively." There was no other testimony than that of this witness on this subject, and the substance of his testimony was that there were different causes that might have produced the explosion and he did not know how it was produced. When it is considered that there can be no recovery unless the plaintiff proves by affirmative testimony that the cause of the explosion was one for which the defendant was liable, and he simply proves that the cause was unknown, his proof is radically defective and he cannot recover for that reason. The jury could only reach a verdict by conjecture without proof, and this, as we have many times said, is insufficient.

But in the next place there was not a particle of proof in the cause that the defendant employed the fellow servant knowing that he was incompetent, and there was no proof that he had the reputation of being incompetent. Not a word of testimony was given or offered on this most vital subject. Not a witness testified that he had such a reputation. One witness, Bebout, said he had known him for several years before the accident and that he knew him as being engaged in other pursuits at different times, but not a word did he say touching his reputation as a workman or as a boiler tender. There was a total failure of proof that the man had any reputation as an incompetent workman where he was employed. But there was affirmative proof by the defendant's witness, Bailey, that when Snyder came there he was recommended as an engineer, that he took him around the boilers and explained to him what he was to do, that he was intelligent and understood at once what he was to do and took it up immediately, that he regarded him as an entirely competent workman and never had any occasion to think otherwise.

In the absence of any proof of bad reputation as a workman, the plaintiff undertook to prove his incompetency and the defendant's knowledge of it by testifying that on two or three occasions he told Bailey that Snyder was not a fit person to tend the boilers. His testimony was that, on August 23d, "I told him (Bailey) that that man was not capable of handling them boilers and he said he knowed he wasn't, and he says, 'Do the best you can for a few days.'"

He said he again complained on the following Saturday, the 27th, that Snyder "came in the boiler house and put a monkey-wrench onto one of the feed valves and gave it a twist and broke it and let the hot water run out. Q. What did you do? A. I ran after Bailey and I couldn't find him, and so I got the pipe fitters and put another valve in. Q. Did you say anything to Mr. Bailey at that time? A. After we got the stream started, I says, 'You didn't get a man in Snyder's place; now you can get one in mine;' and he says, 'No, you stay where you are, and I'll get you a man right away.' Q. What else? A. He said Snyder was all right; there was no danger of burning or doing any harm to the boilers,—to just watch him." On one other occasion, soon after Snyder came, the plaintiff says, "I told him (Bailey) there was too many boilers for the men to handle; that he was not competent." There are three radical defects in this testimony to make out the essential requirement of the plaintiff's case: (1) It is the mere declaration of the plaintiff that he told Bailey that Snyder was incompetent, without any statement as to how or why he was incompetent. (2) It contains no proof of any actual incompetency. (3) The declarations are absolutely denied by Bailey, who is a disinterested witness.

As to the first, it will be observed that the witness simply says he told Bailey that Snyder was incompetent, but gave no reason for saying so, and gave no particulars in support of his statement. He did not say, but implied, on the last occasion mentioned, that he was incompetent to handle so many boilers, which would be his opinion only as to Snyder's physical competency. On the occasion of Snyder's breaking one of the feed valves with a wrench it did not follow that he was in the least degree incompetent, as the valve might have broken from inherent weakness and there was no explanation. On the other occasion he merely said Snyder was incapable of handling the boilers. Bearing in mind now that the undertaking of the plaintiff is to prove the knowledge by the defendant of Snyder's actual incompetency, and retaining him in their employment after such knowledge, it will be seen at a glance how entirely inadequate the foregoing proof is to that exigency.

• The plaintiff does not claim that he informed Bailey of any actual facts showing real incompetency, and therefore they could not have any knowledge on that subject. The plaintiff's declaration might be true or it might not, but it did not impart the least information of any actual incompetency and therefore it cannot be said that the defendant had any such knowl-

edge. Nor is a jury in any better situation as to this essential fact. How can they find upon such testimony that the defendant had any knowledge of any actual incompetency of Snyder's? It is impossible because the jury don't know themselves whether such was the fact.

In the next place not a particle of proof of actual incompetency was given in evidence. The plaintiff did not pretend to say that Snyder had done any acts which were careless or negligent, as for instance that he had allowed the water in the boilers to get too low. There is not a fragment of testimony in the whole cause showing that or any other act of incapacity or negligence. How then could the defendant have knowledge of any actual incapacity or negligence on the part of Snyder, and thereby become chargeable with the consequences of such knowledge? The liability of the defendant does not arise upon the mere declaration of some witness of the fact of incompetency of their agent, but upon proof of the fact of actual incompetency imparted to them, and of that there is not a particle of proof in this case.

But in the third place the declarations such as they were are denied absolutely, emphatically and positively by Bailey, and the case stands upon the testimony of the plaintiff, a most deeply interested witness, in his own favor, and the entirely disinterested testimony of Bailey in flat contradiction. It is not enough to reply that the jury is the judge of the credibility of witnesses. The case involves a peculiar phase of liability depending upon the knowledge by the defendant of a certain fact. Considering that there is no proof of the fact in question, and that there is no evidence in support of the charge of knowledge by the defendant except the interested declaration of the plaintiff himself against the disinterested denial of the declaration by the person to whom it was alleged to be made, the case presents nothing more than a mere *scintilla* of proof entirely insufficient to sustain a verdict.

But to cap the climax of insufficiency of proof, it was not proved that the explosion of the boiler was the result of any negligent act or omission of the fellow servant, and nothing but a tissue of conjectures without any proof of actual facts to support them could enable a jury to find a verdict for the plaintiff. But lawful verdicts cannot be rendered upon such principles. We are clearly of opinion that the evidence is entirely insufficient to justify a verdict for the plaintiff and therefore sustain the fourth, fifth and sixth assignments of error. It is not necessary to consider the other assignments.

Judgment reversed.

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THE RULE IN SHELLEY'S CASE—SHOULD IT BE ABOLISHED?

The following paper by James T. Maffett, Esq., of the Clarion Bar, was presented at the meeting of the Pennsylvania Bar Association, held at Bedford, Pa., July, 1896, and referred to the Committee on Law Reform:

"In wills, the cardinal rule of construction is, that the intent of the testator is to be gathered from the four corners of the will, taken as a whole.

"All technical rules of construction yield to the expressed intention of the testator, if such intent be lawful.

"The rule in *Shelley's Case* is the one exception that strikes down the plain intent of the testator.

"This is so because it is a rule of law, and not of construction; and if the language of the will brings it within the rule, no contrary intent of the testator, however plain and emphatic, will defeat the operation of the rule.

"The rule leads to hairsplitting decisions and distinctions over the words 'issue' and 'children' in many wills.

"The rule is absurd and vicious. The rule is taken advantage of by sharpers to plunder estates. In our county there have been numerous instances where supposed life estates have been purchased for a song at sheriff's sale under the advice of sharp attorneys, who afterwards divided up the fee-simple title with the purchaser. In this connection I commend to the consideration of this association the following extracts from an address delivered before a recent meeting of the Illinois Bar Association:

"The common law is not the embodiment of wisdom, neither is it the perfection of reason. In the very nature of things it could not be so. It had its origin in the usages and customs of semi-barbarous age, and the stream can never rise higher than its source."

"This address, after illustrating some of the absurdities of the common law as to the importance and significance of a seal, although it be but a little wiggle made by the pen after the signature, continues:—

"And the rule in *Shelley's Case* is not a whit less absurd. The facts of this ancient case show that its determination was based on the doctrine of primogeniture. One illustration: Once upon a time an old German lived in

Chicago. He was the owner of certain lots in that city. He was blessed with four sons, and each of these sons had children. This old gentleman, like many other grandparents, was very fond of his grandchildren. With a sound mind and memory he writes his last will and testament. He wishes to give these lots to his sons during their life, and after their death he wants them to descend to his grandchildren. So he says: "In the name of God, amen. I give and devise unto my sons lots 13, 14 and 15, in Chicago, but neither of them shall sell or mortgage any of the lots, but the same shall go to their heirs after them." Nothing could be clearer, than that this old man intended these lots to go to the sons during their lifetime, and that the grandchildren should take the fee-simple. The sons become dissatisfied, and bring suit. The case goes to the Supreme Court of Illinois. And this will, a plain instrument without ambiguity or doubt, is taken by the court and placed in the pillory of the dark ages, so to speak, subjected to the thumb screws of the rule in *Shelley's Case*. And the result is, that the sons get the fee-simple and the grandchildren get nothing. And this is the wisdom of the common law. The curious will find this case in 129 Ill. 164."

"The same absurdity is exhaustively discussed and fully applied in *Grimes v. Shirk*, 169 Pa. 74."

Supreme Court, Penn'a.

BLAKLEY v. MARSHALL.

Where land is leased by the life tenants and trustees of the remainder-men to be operated for oil purposes, a certain per cent. of the oil obtained to be paid as rent, the life tenants are entitled only to the interest for life on the proceeds of the rent; the principal on their death, to go the remainder-men.

Appeal of Isaac E. Blakley *et al.*, from the judgment of the Court of Common Pleas of Butler county, on a case stated as follows:

"And now, third day of September, 1895, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the court in the nature of a special verdict:

"1. The plaintiff, Isaac E. Blakley and Louisa Blakley, are the life tenants of a certain plantation, or farm, situated in the township of Adams, county of Butler and State of Pennsylvania, and their children, all of whom are minors, are the remainder-men of the said plantation in fee under and by particular covenants contained in a certain deed from one Andrew Blakley, dated the 28th day of November, 1890, and attached to this case stated, marked 'exhibit A,' and made part of the same. The defendant is a trustee, appointed by the Court of Common Pleas of Butler county, to receive certain oil royalties, hereinafter more particularly referred to, invest the same and pay over to Isaac E. Blakley and Louisa Blakley, during life and the life of the survivor, the interest annually arising upon the said fund, and at the death of both, the principal sum to the children of the

said Isaac E. Blakley and Louisa Blakley, the remainder-men in fee as aforesaid, the said Isaac E. and Louisa Blakley, trustees named in the deed by Andrew Blakley, having refused to give bond, claiming the right to the oil in the premises under the facts of the case as life tenants.

"2. That some time prior to the 10th day of August, 1894, petroleum oil was discovered to exist under lands about and around the said plantation being the lands of others than the plaintiffs and the said remainder-men, and the owners of such other lands thereupon began to obtain proper wells to be put down upon their said several lands to obtain the oil thereunder at such places and situations with reference to the said plantation, that all the oil existing under the said plantation would be drained through the said wells of such other owners, so that the oil lying under the said plantation would thereby become dissipated and lost to the said premises, both to the plaintiffs and the said remainder-men, and that there is no known mechanical means to prevent the same.

"3. That under said state of facts, and with knowledge of the same, the said Isaac E. Blakley and Louisa Blakley did, on the 10th day of August, 1894, lease and let unto one N. B. Duncan, his heirs or assigns, a certain portion of the said plantation to drill for oil, which lease is in the ordinary, accustomed and general form in the neighborhood and the oil regions of Pennsylvania, of which lease a copy is hereto attached, marked 'exhibit B,' and also made a part of this case stated.

"4. That at the date of the making of the said lease, the said Isaac E. Blakley was forty-three years old and the said Louisa Blakley thirty-seven years old, both in good health, with expectancies of life, by the Carlisle Tables of Mortality, of 25.8-100 and 28.48-100 years respectively. That at the dates of the said deed and lease, the said plaintiffs had born to them children as follows: Henry A., Amelia M., Walter G., Gertrude A., Sarah L., Charles J., and John B. Blakley, all of whom, with one or two exceptions, were and are residing with their parents on the said plantation.

"5. That under the said lease a well has been drilled upon the said premises, and the same has been for some time past, and is now, producing some sixty barrels of oil per day, and the oil therefrom is being conducted into lines of the Producers' Pipe Line Company and the National Transit Pipe Line Company, which is ready to make settlement for the said oil, and pay the royalties therefor, being the one-eighth of the said oil, to the person or persons entitled to receive the same in law.

"6. That the plaintiffs herein claim the said royalty as their own individual property as life tenants of the said premises, free and discharged of any trust or confidence whatsoever, and the defendant likewise claims the same as his property for the purpose of his said trust and appointment.

"Now, if the court be of opinion that the said royalties are the property of the plaintiffs according to their claim, then judgment to be entered in their favor for the sum of one dollar, but if not, then judgment to be entered for the defendant. And it is further agreed that either party shall have the right to take an appeal or other proper proceedings to review alleged error in the court below. It is further agreed that the amount in controversy in this case exceeds one thousand dollars."

The deed to Isaac E. Blakley and wife was as follows:

This indenture, made the 26th day of November, in the year of our Lord, one thousand eight hundred and ninety, between Andrew Blakley and Sarah Jane, his wife, of Adams township, Butler county, Pa., of the first part, and Isaac E. Blakley and Louisa, his wife, of the same place, in their own right for life and trustees for their children, as well of those born, as those also which may be hereafter born.

In fee subject to the life estate of the said Isaac E. Blakley and Louisa, his wife, of the second part, witnesseth: That the parties of the first part, for the consideration of eight thousand nine hundred and twenty dollars, paid by the said Isaac E. Blakley and Louisa, his wife, trustees, as well as for the love they bear to their children, have bargained, granted, sold and conveyed, and do by these presents grant, bargain, sell, convey and assure unto the said Isaac E. Blakley and Louisa, his wife, for and during their life and to them as trustees of said children, their heirs and assigns forever, subject to the life estate of the said Isaac E. Blakley and Louisa, his wife.

All that certain, etc.

To have and to hold the said 111½ acres strict measure; together with all and singular, the buildings, improvements, etc., to them the said Isaac E. Blakley and Louisa, his wife, for and during their life and no longer, and as trustees and in trust for their said children, their heirs and assigns forever, subject to the life estate of said Isaac E. Blakley and Louisa, his wife, and in case of the death of Isaac E. Blakley, Louisa Blakley, his wife, and one of the parties of the second part shall only be trustee, and have control of the above mentioned property, so long as she remains his widow.

The lease to Duncan was made in the name of "Isaac Blakley and Louisa Blakley, in their own right and as trustees for their children."

Thomas M. Marshall, Esq., was appointed by the court, trustee to receive the royalties reserved in the lease.

The court, GREER, P. J., entered judgment for defendant in the case stated, and the plaintiff appealed, assigning for error this action of the court.

For appellants, *Sponsler & McQuaide* and
Kennedy Marshall.

Contra, *J. D. Marshall*.

Opinion by STERRETT, C. J. Filed March 23, 1896.

No question is raised in this case stated as to the validity of the lease under which the oil in question was produced; nor is there any question as to the title of the lessors to the leased premises. By their informal deed of November, 1890, Andrew Blakley and wife granted and conveyed to Isaac E. Blakley and Louisa Blakley, the plaintiffs, a life estate in the land, with remainder in fee to their children, and appointed said life tenants trustees for their said children: *Habendum*, "to them the said Isaac Blakley and Louisa, his wife, for and during their life and no longer, and as trustees and in trust for their said children, their heirs and assigns forever, subject to the life estate of said Isaac E. Blakley and Louisa, his wife; and in case of the death of Isaac E. Blakley, Louisa Blakley, his wife * * * shall only be trustee and have control of the above mentioned property so long as she remains his widow."

Acting for themselves in their own right as tenants for life, and also as trustees for those in remainder, the plaintiffs executed the lease to N. B. Duncan, "for the purpose of operating and drilling for petroleum and gas," for the term of fifteen years from August 10, 1894, "and so long thereafter as oil and gas can be produced in paying quantities." It was obviously necessary, as well as to the interest of both the tenants for life and the remainder men, that they should thus unite in the lease, because no practical oil operator would undertake the development of supposed oil territory on the faith of a lease from life tenants only, and for the further and more important reason that, if not promptly developed and worked, the land would soon have been drained of its oil through wells on adjoining lands.

The leased premises proved to be productive, and the oil in question represents the lessors' royalty under the lease. As life tenants of the premises, plaintiffs claimed the oil as their individual property, free and discharged from any trust or confidence whatsoever. The defendant is a trustee, appointed by the court below, to receive the lessors' share of the oil produced under the lease, invest the proceeds, and pay the interest annually realized therefrom to the plaintiffs during their joint lives and the life of the survivor, and, at the death of the latter, to pay the principal to the remainder-men entitled thereto.

In support of plaintiffs' claim to the whole of the royalty, etc., much stress was laid on the doctrine of waste; but we fail to see that it has any application whatever to the facts of this case. It is conceded that the oil was produced under the lease made by plaintiffs, in their own right as life tenants, and as trustees for those in remainder; and, as appears by the opinion of the court, their action as trustees for the remaindermen was with its sanction and approval. It is difficult to see on what principle the *cestui que trust* should be excluded from participation in the royalty that accrued during the existence of the life estate. Assuming, for sake of illustration, that they had been of full age and *sui juris*, and instead of being parties, through their trustees, to an oil lease, they and the tenants for life had united in a conveyance in fee of part of the land, could it, in the absence of any agreement on the subject, be successfully claimed that the life tenants were entitled to the purchase money? We think not. There is no difference, in principle, between the two cases. As was held in *Stoughton's Appeal*, 88 Pa. 201, and other cases in same line, oil in place is a mineral, and, being a mineral, it is part of the realty. An oil lease, investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain percentage thereof, is in legal effect a sale of a portion of the land and the proceeds represent the respective interests of the lessors in the premises. If they be life tenants and remainder-men, the former are entitled to the enjoyment of the fund (*i. e.*, interest thereon) during life, and at the death of the survivor the *corpus* of the fund should go to the remainder-men. This is as nearly a just and equitable distribution as can be made. It is in accord with the conclusion reached by the learned president of the court below; and there appears to be no reason why the judgment should be either reversed or modified. We are all of opinion that it should be affirmed.

Judgment affirmed.

McKEESPORT MACHINE COMPANY v. THE BEN FRANKLIN INSURANCE COMPANY.

If the policy is susceptible of two or more interpretations, that should be adopted which will make it most effective for the protection of the insured.

An insurance company issuing a policy on a business plant or any portion of it is chargeable with knowledge of the customary methods of conducting the business in which the property is used.

The circumstances surrounding the making of the contract and affecting the subject may be resorted to for aid in determining the meaning of the contract.

The plant of a manufacturing company consisted of two buildings, very near to each other, and machinery and

appliances therein; one building—the “pattern shop”—being used for making and storing patterns, and the other for making and fitting castings. The plant was covered by a policy insuring it “while located and contained as described herein, and not elsewhere,” and the policy described all the property as being on a certain corner, and the patterns as being in the pattern shop. Held that, upon the burning of the building in which the castings were made, without any injury to the pattern shop, the insurer was liable for patterns which were at the time in the building burned for purposes of actual use.

Appeal of the McKeesport Machine Company, plaintiff, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* brought against the Ben Franklin Insurance Company to recover on a policy of fire insurance.

The written stipulations in the policy were as follows:

On their two-story frame, iron clad, iron roof building, occupied as a pattern shop, \$400; on engine, lathe, band saw, benches, pulleys, hangers, gearing and tools therein and on lumber, \$450; on patterns therein, \$1,000; on their one-story frame, iron clad, iron roof building, occupied as foundry, machine shop and blacksmith shop. All situate corner Fourth avenue and Martin street, \$800; on boiler and engine therein, \$300; on belting, shafting, pulleys, hangers and gearing therein, \$600; on large crane and flasks in building and in yard, \$450; on lathes, planers, drill press, bolt cutter, fans, office furniture, tools and supplies, work benches and all other machinery and fixtures therein used in their business, \$2,000.

The first paragraph of the policy is as follows:

“In consideration of the stipulations herein named and of eleven and 25-100 dollars premium does insure McKeesport Machine Company for the term of one year from the fourth day of August, 1892, at noon, to the fourth day of August, 1893, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding seven hundred and fifty dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit: As per form attached.”

The jury found a special verdict as follows:

We find for the plaintiff in the sum of \$175.83, of which the sum of \$125, with its interest, the amount of insurance by defendant on patterns, as set out in the policy, *i. e.*, one-eighth of \$1,000.

We further find that the buildings insured and set out in the schedule of the policy constitute one plant, or manufactory, contained in one inclosure and lot 12 by 140 feet. That the pattern shop is 15 to 20 feet from the foundry and machine shop, and that the fire occurred in and was confined to the foundry building,

and that no patterns were burned in the pattern shop, but patterns were burned in the foundry building usually kept in the pattern shop, which were there for use, being removed from the pattern shop to the foundry the evening of the fire for actual use the next day in accordance with the orders and custom in this and other shops in the use of patterns, and that such custom is a reasonable one and necessary in the convenient operation of such a plant, and that the agent of the defendant company examined the shops and patterns and buildings before taking the insurance. For further certainty we make the policy sued on and annexed to plaintiff's statement a part of this verdict.

If the court be of the opinion that on this statement of facts under the terms and schedule of the policy the defendant's policy covered patterns temporarily out of the pattern shop for use—then judgments to be entered on the verdict for the full amount.

If the court be of the opinion that the policy does not cover the patterns so burned, then judgment to be entered in favor of the plaintiff for \$42.08, *non obstante verdicto*.

The court in an opinion by EWING, P. J., entered judgment for defendant on the special verdict.

For appellant, *L. K. & S. G. Porter and James Fitzsimmons*.

Contra, *J. W. Hall and J. H. Harrison*.

Opinion by WILLIAMS, J., Filed January 6, 1896.

The policy sued on in this case was issued to a manufacturing company and covered the buildings, machinery, fixtures and appliances in daily use in the business of the company. The rules of construction applicable to such a contract of insurance are well settled. The object of the contract is indemnity against the loss by fire of the business plant, or any portion of it, while used and occupied by the owners in the manner and for the purposes for which it was designed. If its provisions are susceptible of two or more interpretations, that one should be adopted that will make the contract effective for the protection of the insured. In other words the contract should be liberally construed in aid of the indemnity which was in contemplation of the parties who made it: *Western & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. 346. Again, an insurance company issuing a policy upon a business plant, or any portion of it, is chargeable with knowledge of the customary methods of conducting the business in which the property insured is used: *Pipe Line v. Home Insurance Co.*, *supra*. This rule is not

limited to insurance upon property in use for manufacturing or other business purposes. It was applied in the construction of a policy issued upon a dwelling house in *Doud v. Citizen's Ins. Co.*, 141 Pa. 47, and in *Roe v. Dwelling House Ins. Co.*, 149 Pa. 94. It was applied to a policy of insurance upon a horse in *Haws v. Fire Association of Phila.*, 114 Pa. 431. Still another rule of construction is that the circumstances surrounding the making of the contract and affecting the subject to which it relates form a sort of context that may properly be resorted to for aid in determining the meaning of the words and provisions of the contract: *Bole v. New Hampshire Fire Ins. Co.*, 159 Pa. 53; *Graybill v. The Penn Township Mutual Fire Ins. Co.*, 170 Id. 75. An application of these rules to the policy before us will dispose of this appeal. The plaintiff was a manufacturing company engaged in the foundry and machine business. Its plant consisted of two buildings very near to each other, and the machinery, fixtures and appliances used in their business. One building was called the "pattern shop" and seems to have been mainly used for making patterns and storing them when not in use. The other was called the "foundry and machine shop" in which the casting was done and such further work as was necessary to fit the castings for the uses intended. The nature of the business required the company to use its patterns in the foundry and machine shop only, and when not in use they were kept in the pattern shop as a convenient place for storage. The policy covers the entire plant, viz., both buildings and their contents. The fire affected only the foundry and machine shop and what was within it at the time the fire took place, but this included certain patterns then in actual use in the ordinary course of the plaintiff's business, but which were described in the policy as in the pattern shop where they were kept when not in use. As the pattern shop was not involved in the fire the insurance company denies its liability for the loss of the patterns because they are described in the policy as in that building, and because in the printed part of the policy the undertaking of the insurer is stated as an undertaking to insure the property real and personal described in it "while located and contained as described herein and not elsewhere." The location of all the property insured is stated in the policy in these words: "All situate corner of Fourth avenue and Martin street." This was the location of the business plant at the time of the fire, and all the machinery, fixtures, tools and appliances were in their proper places as part of the plant and

in actual use as such, when the fire occurred. We have no doubt that they were protected by the policy while so located and used, and the well settled rules of construction to which we have referred require us so to hold. In *Graybill, for use, v. The Penn Township Mutual Fire Ins. Co.*, *supra*, substantially the same question was presented.

The insured was engaged in business as a butcher and dealing in both fresh and smoked meats. The policy covered the butcher shop and contents, and the smoke house and contents. The butcher shop was consumed by fire and the smoke house was not. The contest was over the liability of the insurance company for the smoked meats that had been taken from the smoke house and stored in a room used for that purpose in one corner of the butcher shop. We held that the policy was to be construed in the light afforded by the customary modes of conducting the business and the facts as they were communicated to the agent of the company by whom the insurance was effected at the time the parties were in negotiation. The jury found that the words "contents of the smoke house," as understood by the parties, included the smoked meats in store as well as those undergoing the process of smoking. So in this case; if this insurance was upon a going mill or factory in which the tools, machinery and patterns were in regular and continuous use for the purposes of the business of the owners, the contract of insurance must be construed in the light of that fact, liberally, in aid of the insured. It was not an insurance upon goods in store, in terms, and unless it becomes so in the light of the facts appearing in the evidence, there is no legal reason that we can see why the plaintiff should be held to be concluded by words that could not have been intended to apply to a business in actual progress, and that ought not to be so construed even if the insurer intended thereby to escape from the obligation assumed by the policy. It would enable an insurer after receiving the money of the manufacturer for an insurance upon his business appliances, to say to him in effect, "Close your factory or forfeit the money you have paid us. To secure the benefit of your policy, you must leave everything unmoved." Nothing short of a stipulation of this sort incorporated into the policy in words capable of no other construction could induce us to aid in the perpetration of such injustice.

The judgment is reversed and it is now decreed that judgment be entered in favor of the plaintiff on the special verdict.

MITCHELL, J., dissents.

Court of Common Pleas No. 2.

BURK v. HOWLEY et al.

In order to justify an arrest without an information there must be reasonable grounds for suspicion as well as fears that the party may escape.

Where the evidence shows that a defendant in an action for false imprisonment may not have been responsible for the arrest of the plaintiff, but was responsible for her detention in jail for eight days without a hearing, a verdict against him will be sustained.

No. 37 July T., 1895. Motion for new trial by defendants.

Opinion by WHITE, J. Filed June 27, 1896.

The defendant, Whitehouse, was almost lost sight of during the trial. Howley was the real defendant. All the testimony was in reference to his connection with the case, and the defense in his behalf. Whitehouse had charge of the lock-up, where the plaintiff was confined. No doubt, as stated in the charge, he believed Howley was responsible for her arrest and detention, and may have believed he had no responsibility in the matter. But he was mistaken in that. He cannot receive and keep a prisoner eight days and seven nights in the lock-up, when no information is made, no warrant authorizing the imprisonment, and no hearing, or an opportunity of the prisoner having a hearing. He had no right to keep the plaintiff confined indefinitely, simply because a police officer brought her there. He should have reported the case at once to headquarters, when doubtless the girl would have been discharged.

While I think Whitehouse was legally a party to her long detention, I do not believe he was conscious of his wrongful act. The plaintiff does not insist upon holding him. A new trial, therefore, is granted as to Henry Whitehouse.

But I cannot see any just ground for granting a new trial to W. E. Howley.

Complaint is made about certain expressions in the charge. The charge was very explicit in denouncing the arrest and imprisonment as a great outrage. It certainly was, and is virtually admitted. Complaint is also made as to certain expressions being erroneous in law. After a careful scrutiny of the charge, I am not convinced of any error. It is said that police officers or private persons have no right to arrest a party on "mere suspicion." Certainly that is the law. As a general rule there must be an information and warrant to justify an arrest. There are exceptions to the rule. Where a felony has been committed, and "reasonable ground" for suspecting a party, and he may escape before a warrant can be obtained, he may

be arrested, and held until information can be made and a warrant issued. But he cannot be arrested on *mere* suspicion; there must be *reasonable grounds* for suspicion, as also fears that he may escape.

In this case there was *mere* suspicion, without any facts or circumstances to give reasonable grounds for the suspicion, and no danger whatever of the girl escaping. In fact the only grounds of suspicion were, that the plaintiff was a colored girl, and slept in the house. The fact that no information was ever made against the girl is conclusive evidence that there was no reasonable ground for suspicion against her. There was as much, if not greater, reason for suspecting some of the men that had been working in the house that day.

Howley testified to certain things about the doors and windows in which he is contradicted by the girl, and not sustained by other testimony. In fact he testified that he had nothing whatever to do with the arrest, or the detention of the plaintiff in the lock-up. He tried to put the whole blame upon the city officers. To the same end he denied the testimony of witnesses that he was keeping her in prison to make her confess. The jury disbelieved his testimony, in which they were undoubtedly right.

The case of *McCarthy v. De Armitt*, 99 Pa. 63, is not in conflict with the charge, but in perfect harmony with it. There was a great riot in which several murders had been committed. Before the officer arrested De Armitt, he had made inquiries and received information which created a reasonable suspicion, and in the excitement, he might escape if guilty and knew he was suspected.

During the whole trial there was no admission by Howley that he had done anything wrong, and nothing said to vindicate the character of the plaintiff. The whole drift of the testimony and trial was to make the jury believe she was a party to the burglary, and this was persisted in after being admonished by the court.

During the trial the court tried to have the case settled on a reasonable compromise. After a good deal of persuasion the plaintiff's counsel agreed to take \$500. The court strongly urged the defendant to settle on that basis. His counsel advised him to do it. He stubbornly refused to pay one cent, hoping, no doubt, that the jury would find a verdict in his favor, putting the wrong upon the city officers, or if not that, that they would let him off very lightly, as she was only a hired colored girl, and he could make them believe she was a party to the burglary.

I never tried a more outrageous case of false

imprisonment, and never one where there was a more heartless defense.

Left to myself I would not abate one dollar of the verdict. But my associates on the bench think the verdict should be greatly reduced. In deference to their opinion it is ordered, that if the plaintiff, within 20 days, will file a release of the amount of the verdict above three thousand dollars, new trial will be refused, otherwise new trial will be granted.

Defendant complains of the answer to one of his points. That point was to the effect that if Howley had nothing to do with the arrest, this verdict should be in his favor. That ignored any responsibility for the plaintiff's detention in the lock-up for eight days. Even if he was not a party to her arrest, the evidence clearly showed that he was directly responsible for her detention and imprisonment in the lock-up for eight days, for the purpose of extorting a confession from her. The point, therefore, could not be affirmed unqualifiedly.

Judge EWING dissents and would grant a new trial.

For plaintiff, *Ammon Bros.*

Contra, J. H. Beal and D. F. Patterson.

Orphans' Court.

In re Estate of JOHN W. BURNS, Deceased.

Where a beneficial certificate has been assigned by the assured and the beneficiary to a creditor of the assured as collateral, the beneficiary's rights are only subordinated to those of the creditor, and upon the death of the assured he is entitled after the payment of the creditor to the surplus.

Audit of executor's account.

Opinion by OVER, J. Filed August 19, 1896.

John W. Burns, a bachelor, died testate, having given his estate to his sister, half sisters and half brothers, who except to the account of David Hardy, the executor.

In the second and third exceptions it is alleged that the accountant should be surcharged with the value of the decedent's interest in the firm of Burns & Marx, operating the Hotel White in McKeesport. It appears from the testimony that the firm started business with borrowed capital, which was not repaid. That its assets were barely sufficient to pay its debts, and that the accountant wisely transferred the decedent's interest to the surviving partner, upon his assumption of the firm debts. These exceptions therefore cannot be sustained.

In the fourth exception it is claimed that the accountant should be charged with three thousand dollars, the amount of a beneficial certifi-

cate on the life of the decedent, in the Improved Order of Heptasophs, the proceeds of which were, it is alleged, received by him as assignee of the certificate. The following is a copy of this certificate and the assignment thereon:

"No. 8986. \$3,000.

"IMPROVED ORDER HEPTASOPHS

"CONTRIBUTOR'S ENDOWMENT CERTIFICATE.

"This certifies that John Wm. Burns has been initiated and is a contributing member of McKeesport Conclave No. 81, in good standing. In accordance with and under the provisions of the laws governing the order, the sum of three thousand dollars will be paid by the Supreme Conclave Improved Order Heptasophs as a benefit, upon due notice of his death, and the surrender of this certificate to such person or persons as he may, by will or entry on record book of this Conclave, or on the face of this certificate, direct the same to be paid, provided he is in good standing when he dies.

"Given under the seal of McKeesport Conclave No. 81, Improved Order Heptasophs, at McKeesport, Pa., this 28th day of March, 1889.

"JOS. F. ORDNER, *Archon.*

"D. GEO. BECKETT, *Secretary.*

"EDWIN EARECKSON, *Supreme Secretary.*

"To the Officers and Members of Supreme Conclave Improved Order Heptasophs:

"It is my will that the benefits named in this certificate be paid to half brother, George H. Zink, Cumberland, Md.

"JOHN W. BURNS,

"*Signature of Contributor.*

"Witnesses: W. E. THOMPSON,

"JOHN SMALL.

"This certificate must be surrendered whenever the contributor changes his rate of assessment.

"PITTSBURGH, PA., August 10th, 1893.

"For a valuable consideration I herewith assign all my right, title and interest of the within policy to David Hardy, of the city of McKeesport, the assignment is made for the purpose of repaying David Hardy part the am't of money due him by myself.

"Witness my hand and seal this 10th day of August, A. D. 1893.

"JOHN W. BURNS. [SEAL.]

"Attest: A. H. ROWAND, JR.

"Jan. 31st, 1894, I herewith join in the above assignment. "GEORGE H. ZINK. [SEAL.]

"Attest: ———"

After the death of Burns both Hardy and Zink, the beneficiary named in the certificate, claimed the money due on it; and Hardy brought an action in the Court of Common Pleas No. 1, in the name of Zink, for his use,

against the Order of Heptasophs to recover the money. It paid the \$3,000 into court, Zink intervened in the suit and claimed the fund, and the court after hearing the case upon depositions taken, awarded it, less \$100 allowed the defendant's attorney to Hardy. Zink took an appeal, and subsequently the case was settled; and the Court of Common Pleas No. 1, in pursuance of the agreement between Hardy and Zink, ordered the payment of \$850 of the fund paid into court to Zink, and the balance to Hardy. After the payment of costs and counsel fees Hardy received \$1500. Although the assignment indorsed on the certificate recites that it "is made for the purpose of repaying David Hardy part the amount of money due him by myself;" yet in a letter written by Hardy to Zink after Burns' death, he says, "If the hotel can be sold for enough to pay all debts, which I hope it can, and a great deal more, why the insurance policy which Burns and I had you sign, will be all yours." So that the assignment seems to have been only collateral.

The decedent was very intimate with Hardy, made his home with him, and borrowed money from him frequently; Hardy also indorsed notes for the firm of Burns & Marx to a large amount. In the will Burns makes the following reference to his indebtedness to Hardy: "I desire that my friend David Hardy, who has always been my good friend, be paid in full for all moneys advanced for me, or moneys that he has become surety for me." The liability of Burns' estate for the firm indebtedness, however, was cancelled by the surviving partner, with the consent of the creditors, assuming the firm indebtedness; so that Hardy could only claim the money on the certificate on account of Burns' individual indebtedness. The evidence is not clear as to its amount. Two witnesses testified that when the certificate was assigned he said he owed Hardy three to four thousand dollars; but Hardy testifies that it did not exceed fourteen or fifteen hundred dollars. He took no notes or due bills from Burns; but produced checks made to his order and indorsed by him aggregating \$467.35. He also testified to particular loans in cash amounting to \$400; and as to the balance could not give instances in which the loans were made. If the burden of proof be upon him he has only established loans to the amount of \$867.35. And if he is liable as executor for the difference between it and the amount received by him, \$1500, he must account for it. That he is not, however, seems reasonably clear. The constitution and by-laws of the order provide that a certificate cannot be made payable, nor assigned to a creditor, and that any assign-

ment shall be void. It, however, did not raise any question as to the validity of the assignment; but paid the money due upon the certificate into court, and Zink, the beneficiary named in it, and Hardy, the assignee, received it. If the assignment was intended to be absolute, founded as it was, on a valuable consideration and consented to by the beneficiary, as between Zink and Hardy, the latter was entitled to the whole of the fund. It appears, however, from the evidence adduced here it was not absolute, but only collateral. The joinder of Zink, the beneficiary, in the assignment then was for that purpose. His rights as beneficiary were subordinate alone to those of Hardy as a creditor of Burns; and upon the payment of Burns' indebtedness, the residue belonged to Zink as the beneficiary named in the policy. Hardy had therefore no right to it as executor, and these exceptants no interest in the fund. The exceptions therefore must be dismissed.

For accountant, *A. H. Rowand, Jr., and James Fitzsimmons.*

For exceptant, *J. A. Wakefield, S. S. Robertson and J. R. Henderson.*

In re Estate of EMMA J. FLEMING, Minor.

Any equitable claim which petitioner for allowance for support of minor had, held to be overcome by the fact that the guardian was compelled to employ counsel to collect from petitioner, as administratrix of the minor's father, her distributive share.

Sur petition for allowance for support.

Opinion by OVER, J. Filed August 19, 1896.

It appears from the evidence adduced in this case, that for a part of the period for which an allowance is claimed for the support of the minor, the services rendered by her to the petitioner, were worth her boarding and clothing, and probably for a short period more.

The petitioner made no charges for neither boarding nor money expended, and she seems to have placed herself in *loco parentis* to the minor. If there was, however, any equitable claim for payment for the minor's support, prior to the period her services were sufficient compensation, it is overcome by the fact that the guardian was compelled, by reason of the petitioner's negligence, to expend two hundred dollars for counsel fees, in collecting from her, as administratrix of the estate of the minor's father, her distributive share.

The petition is therefore dismissed at the cost of the petitioner.

For petitioner, *R. S. Martin and Geo. D. Riddle.*

For respondent, *S. H. Shannon.*

REGISTER'S NOTICE.

NOTICE is hereby given that the following accounts of Executors, Administrators, Guardians and Trustees, have been duly examined and passed in the office of the Register of Wills and Clerk of Orphans' Court, and will be presented to the Orphans' Court in and for Allegheny county, for confirmation and allowance on MONDAY, September 7, 1896:

No.	ESTATES OF	ACCOUNTANTS.	FILED.
1	Shields, Hanna.....	Wilson, D. Leet, Executor.....	May 5, 1896
2	Holmes, Jane.....	Donnell, James J., and Porterfield, John, Executors.....	May 5, "
3	Robinson, David.....	Robinson, Thomas, and Robinson, Thomas, Executors.....	May 5, "
4	Hillard, Margaret.....	Porterfield, John, Executor.....	May 5, "
5	Shepherd, R. M.....	Smith, W. H., Administrator.....	May 6, "
6	Johnson J. Frank.....	Johnson, Vernie A., Executrix.....	May 7, "
7	McManus, Mary.....	Griffin, Edward P., Executor.....	May 7, "
8	Roderus, Annie.....	Smith, John W. G., Guardian.....	May 7, "
9	Gaver, Adam, Sr.....	Gaver, Jacob, Administrator.....	May 7, "
10	Hunsey, James.....	Watterson, A. V. D., Guardian.....	May 8, "
11	Davies, Jane.....	Davies, Evan D., Administrator.....	May 8, "
12	Milligan, Mary.....	Milligan, Julia, Administratrix.....	May 9, "
13	Lemon, M. B.....	Freed, Emma, Administratrix.....	May 11, "
14	Robinson, Margaret.....	McCary, John, Executor.....	May 11, "
15	Maroney, Patrick.....	McKenna, E. J., Administrator.....	May 11, "
16	Robinson, David.....	Robinson, John F., and Samuel M. M., Administrators.....	May 12, "
17	Bauer, Minnie.....	Fortish, Phillip, Guardian.....	May 12, "
18	Culhane (or Cotter), Ellen.....	Porter, Stephen G., Executor.....	May 12, "
19	Young, George Jacob.....	Young, Peter, Executor.....	May 13, "
20	Walthour, Harry L.....	Ditman, Eli, Executor.....	May 13, "
21	Klimkowsky, Alexander.....	Amelsen, Arthur, Administrator.....	May 13, "
22	Cuthbert, Andrew.....	Newburn, Stephen, Administrator.....	May 14, "
23	Morgan, Katie.....	Friend, John, Guardian.....	May 14, "
24	Bolije, Herman.....	Bolije, Margaret, Administratrix.....	May 14, "
25	Johnston, Margaret.....	Johnston, Martha G., Administratrix.....	May 14, "
26	Geist, John F.....	Geist, Lena, Administratrix.....	May 14, "
27	Green, John.....	Green, Matilda, Administratrix.....	May 15, "
28	Livingston, Mary.....	Livingston, William R., Executor.....	May 15, "
29	Bauer, Elizabeth.....	Steiner, Frank, Executor.....	May 16, "
30	Schmeisszer (or Schmyser), August.....	Mercantile Trust Company, Administrator.....	May 16, "
31	Glunt, Josiah.....	Glunt, William L., Administrator.....	May 16, "
32	Walker, James H.....	Walker, Samuel E., Administrator.....	May 16, "
33	Carter, Catherine.....	Davis, L. L., Administrator.....	May 20, "
34	Hannah, Mary A.....	Hannah, Harry W., and Cora M., Administrators.....	May 22, "
35	Gallatin, Charles E.....	Lyle, Joseph, Guardian.....	May 22, "
36	Thompson, John L.....	Wilson, A. D., Guardian.....	May 23, "
37	Nolan, James, Rev.....	White, James E., Executor.....	May 23, "
38	Nolan, Catherine.....	White, James E., Executor.....	May 23, "
39	Simpson, Martha A.....	Simpson, Kate H., Administratrix.....	May 25, "
40	McKelvy, James.....	Kennedy, John M., Executor.....	May 26, "
41	Kopp, Charles.....	Hetzell, John C., Administrator.....	May 26, "
42	Tilton, Sarah Ann.....	Tilton, Ole, Administrator.....	May 31, "
43	Galbraith, Robert H.....	Galbraith, Anna C., Executrix.....	May 28, "
44	Bryne, Bernard.....	Brown, William C., Executor.....	May 28, "
45	Brady, Mary.....	Brady, Hugh M., Administrator.....	May 28, "
46	Fulton, William G.....	Fulton, Joseph K., Sr., Executor.....	May 28, "
47	Nolan, Frank.....	Ryan, William J., Executor.....	May 28, "
48	Hughes, Mary R.....	Hughes, Patrick, Executor.....	May 29, "
49	Marlow, John.....	Mackie, Sarah, Executrix.....	May 29, "
50	Grein, Mary E.....	Sorg, J. H., Guardian.....	June 1, "
51	Voncannon, J. B.....	Robinson, William E., Administrator.....	June 1, "
52	Adair, Watson B.....	Nevin, Charles F., Guardian.....	June 1, "
53	Marshall, Sarah E.....	Marshall, Nancy C., Administratrix.....	June 1, "
54	Aber, A. H.....	McGogney, William, Guardian.....	June 2, "
55	Hoedle, Leopold.....	Safe Deposit and Trust Company, Administrator.....	June 2, "
56	Boyle, Henry M.....	Boyle, Jane M., Administratrix.....	June 3, "
57	Neuroth, Margaretha.....	Rabenstein, August, Executor.....	June 3, "
58	Taylor, Benjamin.....	Taylor, George L., Executor.....	June 3, "
59	Schmitt, Franziska.....	Schmitt, Chas., Administrator.....	June 4, "
60	Lanahan, John.....	Cushing, P. M., and Fuhrer, Joseph, Executors.....	June 5, "
61	Sickman, Rachel J.....	Hoffman, John G., Guardian.....	June 5, "
62	Sickman, Elizabeth R.....	Hoffman, John G., Guardian.....	June 5, "
63	McIntire, Joseph P.....	Dillinger, Daniel L., Executor.....	June 8, "
64	Atterbury, Thomas B.....	Atterbury, J. S., and McGinley, J. R., Administrators.....	June 9, "
65	O'Neill, Daniel.....	{ O'Neil, Eugene, and Brown, A. M., Executors and Trustees..... }	June 9, "
66	Emmett, Samuel R.....	Wright, Thomas M., Executor.....	June 9, "
67	Eaton, F.....	Adams, A. A., Executor.....	June 11, "
68	Graber, Mary.....	Gaertner, Gasper, Executor.....	June 11, "
69	Eaton, Rocksaline.....	Cochran, Robert A., Administrator.....	June 11, "
70	McGowan, Sarah J.....	Hope, John, Guardian.....	June 11, "
71	Robinson, Alexander C.....	Robinson, John F., Administrator.....	June 11, "
72	Mellor Catherine.....	Griffin, T. E. S., Administrator.....	June 11, "
73	Miller, Charles H.....	Smiley, Robert, Administrator.....	June 12, "
74	Best, Thomas H., and Best, Nellie S.....	Wilcox, George J., Guardian.....	June 12, "
75	Leichtenscheidt, Fritz.....	Mercantile Trust Company, Administrator.....	June 13, "
76	Miller, Augusta.....	Mercantile Trust Company, Administrator.....	June 13, "
77	Quinn, John.....	Kuhn, A. J., Executor.....	June 13, "
78	Montgomery, Mary.....	{ Montgomery, Nathaniel, and Black, John C., Administrators..... }	June 15, "
79	Dennison, John.....	Dennison, James, Administrator.....	June 15, "
80	Maeder, Alexander.....	Meyer, J. J., Administrator.....	June 15, "
81	Stephenson, Joshua.....	Stevenson, Mary E., Executrix.....	June 17, "
82	McCormic, Mary.....	{ McCormick, Thomas M., and McKelvey, Frank M., Executors..... }	June 17, "

PITTSBURGH LEGAL JOURNAL.

REGISTER'S NOTICE—Continued.

No.	ESTATES OF	ACCOUNTANTS.	FILED.
83	Hare, Margaret.....	Smith, David, Administrator.....	June 17, 1898
84	Dean, Hannah M.....	Dean, Samuel, Executor.....	June 17, "
85	Walker, Joseph.....	Elliott, Wilson L., and McCrory, David, Executors.....	June 17, "
86	Carrall, Michael Thomas.....	Lauer, Mary A., Administratrix.....	June 17, "
87	McDonald, Elizabeth H.....	McDonald, Harry, Administrator.....	June 17, "
88	Nevin, Daniel E.....	Nevin, Joseph T., Guardian.....	June 18, "
89	Metzger, Henry.....	Stoakes, John G., and Martin, William, Executors.....	June 19, "
90	Averbeck, Theodore.....	Averbeck, Henry, Administrator.....	June 19, "
91	Boyd, Andrew.....	Averbeck, Henry, Administrator.....	June 19, "
92	Witherspoon, Ralph.....	Witherspoon, James, Guardian.....	June 20, "
93	Marshall, John.....	Houghton, George S., Administrator.....	June 22, "
94	McCallin, Marian F.....	Houghton, George S., Administrator.....	June 22, "
95	Boswell, Julia A.....	Boswell, George B., Administrator.....	June 22, "
96	Knorr, William.....	Lawrence, A. J., Guardian.....	June 22, "
97	Renzenbrink, Clara and Amanda.....	Meese, Henry B., Guardian.....	June 23, "
98	Renzenbrink, Emma.....	Meese, Henry B., Guardian.....	June 23, "
99	Seidel, A. G.....	Seidel, C. H., Executor.....	June 23, "
100	Diffenbach, Frederick.....	Hacker, George, Guardian.....	June 23, "
101	Wunder, Catharine.....	Wunder, John F., and Joseph A., Executors.....	June 24, "
102	Holmes, Patrick.....	Holmes, John, Executor.....	June 25, "
103	Jann, Franz.....	Reinemann, Louis E., Administrator.....	June 25, "
104	Molay, Patrick.....	Brown, James, and Bonner, John, Executors.....	June 26, "
105	Siler, Tabitha A.....	Poor, J. B., Executor.....	June 26, "
106	Douglas, Joseph.....	Hartman, J. H., and Douglas, W., Executors.....	June 27, "
107	Thomas, George.....	Thomas, Elizabeth, Executrix.....	June 27, "
108	McCloy, Clarissa.....	McCloy, W. R., Executor.....	June 29, "
109	Hopkins, Robert.....	Miller, W. S., Executor.....	June 30, "
110	Courain, Benjamin.....	Courain, L. A., and J. P. Administrators.....	June 30, "
111	Harrop, John W.....	Lewis, George H., Executor.....	July 2, "
112	Farrell, Thomas.....	Harris, William, and Thomas, W. S., Executors.....	July 2, "
113	Miller, Mary Ernestina.....	Miller, Peter, Guardian.....	July 7, "
114	Abrams, Flora.....	Sunstein, C., Guardian.....	July 7, "
115	Galliot, Charles.....	Galliot, Marie, Administratrix.....	July 7, "
116	Devlin, Joseph F.....	Devlin, William V., Administrator.....	July 7, "
117	Hager, John.....	Miller, Henry, Administrator.....	July 7, "
118	Diffenbach, Rosa.....	Schusler, Mary, Executrix.....	July 8, "
119	Muse, Harry J.....	Wilson, William G., Administrator.....	July 9, "
120	Hauenstein, Andrew.....	Henning, William, Administrator.....	July 10, "
121	Connell, Robert J.....	Rankin, M. W., Executor.....	July 10, "
122	Flannigan, Harriet B.....	Walsh, Richard, Executor.....	July 13, "
123	Cook, Elvira H.....	Cook, Thomas McK., Executor.....	July 13, "
124	Bowman, Ann.....	Bowman, Howard M., Executor.....	July 13, "
125	Byers, Ebenezer M.....	Hickson, James, Administrator.....	July 14, "
126	Hermann, Frederick.....	Hermann, Henry, Executor.....	July 14, "
127	Bell, Florence M.....	Brallafor, George, Guardian.....	July 14, "
128	Bielel, Katherine.....	Bielel, Robert A., Executor.....	July 14, "
129	Pettigrew, Susannah.....	Gillespie, J. Shaw, Administrator.....	July 14, "
130	Schacke, Maria.....	Schacke, William and Adam, Executors.....	July 14, "
131	Hardtung, Theodore W.....	Hofmann, Jacob, Guardian.....	July 15, "
132	Kapp, Joseph.....	Kapp, John, Executor.....	July 15, "
133	Neidhart, Adolph.....	Neidhart, Charles, Administrator.....	July 16, "
134	Harkins, Catherine.....	O'Brien, Agnes G., Administratrix.....	July 16, "
135	Flatley, John.....	Union Trust Company, Guardian.....	July 17, "
136	Morgan, Margaret.....	Morgan, Richard, Executor.....	July 17, "
137	Caskey, Charlotte.....	Caskey, Samuel R., and Davis, Gus C., Executors.....	July 18, "
138	Reich, Fred Carl.....	Baeuerlein, C., Guardian.....	July 18, "
139	Warren, Annie, Verner, Viola, Dessle, Edna and Roy.....	Zartman, William, Guardian.....	July 18, "
140	Pearls, Susan.....	Soles, W. C., Executor.....	July 20, "
141	Cox, Isaac.....	Cox, John C., Administrator.....	July 20, "
142	Glasgow, Archie.....	Ferguson, John, Executor.....	July 20, "
143	Hugo, Jacob.....	Donovan, D. G., Administrator.....	July 21, "
144	Koch, Valentine.....	Koch, Catherine, Administratrix.....	July 21, "
145	Robinson, James.....	Robinson, Thomas, Executor.....	July 21, "
146	Blinder, John George.....	Baumgart, George, Guardian.....	July 21, "
147	Snyder, Caroline.....	Snyder, M. A., Executor.....	July 22, "
148	Burger, Thomas.....	Harbison, John R., Trustee.....	July 23, "
149	Dilworth, Joseph.....	Dilworth, Lawrence, Chas. R., and Joseph R., Executors.....	July 23, "
150	Vankirk, Herbert S.....	Vankirk, J. K., Guardian.....	July 23, "
151	Meanor, A. D.....	Doner, W. S., Trustee.....	July 23, "
152	Alcorn, Mary.....	Alcorn, John, et al., Executors.....	July 24, "
153	McDonald, N., Dr.....	Miller, J. H., Executor.....	July 24, "
154	Ralston, William.....	Ralston, Jennie, and Bradberry, William T., Executors.....	July 25, "
155	Burgess, Susanna.....	Lyon, John M., Executor.....	July 25, "
156	McCready, Mary E., and McCready, Lucy, J. G.....	McCready, R. J., Guardian.....	July 25, "
157	Duncan, Edward de B.....	Duncan, Caroline de B., Administratrix.....	July 27, "
158	Duncan, Carrie.....	Duncan, Caroline de B., Administratrix.....	July 27, "
159	Reynolds, William.....	Copeland, Joseph B., Administrator.....	July 27, "
160	Allen, Millie A.....	Mercantile Trust Company, Guardian.....	July 28, "
161	Gibson, George M.....	Maurhoff, E. E., Executor.....	July 28, "
162	Grey, Thomas.....	Jones, Joseph D., and Grey, Adelaide, Executors.....	July 28, "
163	McClure, Valeria Bell, Mattie C., and Robert.....	Calhoun, Alexander, Guardian.....	July 28, "
164	Kristling, Maggie.....	Monath, Henry, Guardian.....	July 28, "
165	McCullough, William.....	Anshutz, Lewis A., Administrator.....	July 28, "
166	Kelly, John B.....	Kelly, Margaret, Administratrix.....	July 28, "
167	Freinstein, Val.....	Hartle, Ed. G., Trustee.....	July 28, "
168	Ewing, William, Jr.....	Ewing, Thomas M., Administrator.....	July 29, "
169	Graham, Nathan.....	Hay, A. B., Administrator.....	July 29, "
170	Haslett, Hugh M.....	Union Trust Company, Guardian.....	July 29, "
171	Seufert, Joseph.....	Holtzman, L. F., Executor.....	July 30, "
172	Hosbach, Elizabeth.....	Hosbach, John W., Administrator.....	July 30, "
173	Benson, Samuel.....	Benson, Elizabeth, and Allison, B., Executors.....	July 30, "

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N.S., Vol. XXVII. }
O.S., Vol. XLIV. }

No. 6.

PITTSBURGH, PA., SEPTEMBER 2, 1896.

Supreme Court, Penn'a.

WARING BROS. & CO. v. PENNSYLVANIA RAILROAD COMPANY.

Plaintiff enters suit and does not file his declaration for fifteen years, when he files his declaration and proceeds. A rule of the court provides that a nonsuit may be entered if plaintiff does not file his declaration within three months after issuing the writ. The court below grant a nonsuit. Held, that they were justified in doing so.

Appeal of Richard S. Waring and Orville T. Waring, late partners as Waring Brothers & Co., plaintiffs, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action of trespass on the case brought against the Pennsylvania Railroad Company to recover damages for alleged unjust discrimination in freight rates in transportation of petroleum oil, claiming damages of \$1,500,000.

(For report of this case as decided in court below, opinion by STOWE, P. J., see 42 PITTSBURGH LEGAL JOURNAL, 289.)

The facts appear in the opinion of the Supreme Court. The errors assigned were, (1) entering judgment of nonsuit; (2) making absolute rule of defendant to show cause why the court should not quash the declaration and enter a judgment of nonsuit.

For appellants, *M. A. Woodward, Shiras & Dickey* and *J. W. Lee*.

Contra, Scott & Gordon.

Opinion by GREEN, J. Filed July 15, 1896.

In this case the writ of summons was issued on November 29, 1879, and service accepted December 1, 1879. No other step was taken until on October 4, 1894, when the plaintiffs filed a statement and affidavit of claim. Thereupon the defendant obtained a rule to show cause why the statement and affidavit should not be stricken off, and a judgment of *non pros.* entered, on account of the *laches* of the plaintiff with their case. No *narr.* or statement of claim was ever filed until October, 1894, almost fifteen years after the writ was issued. The cause of action averred in the plaintiffs' statement originated in November, 1873, about twenty-one

years prior to the filing of the statement. During all of this long period of inaction there was nothing appearing on the record to indicate what claim was made against the defendant, or that there was any cause of action whatever. In the meantime Mr. Hampton, who had accepted service of the writ in writing in the name of his firm, had died. Mr. Dalzell, his partner, had left the practice a number of years before, and the counsel who now represent the defendant are not the counsel who accepted service of the writ nearly fifteen years before. Having carefully read and considered the *ex parte* affidavit made by Richard S. Waring, one of the plaintiffs, as explanatory of the delay in the proceedings, we are bound to say that there is nothing contained therein which in the least degree justifies, or excuses, the remarkable *laches* of the plaintiffs in pursuing their cause. They at all times retained full control over the cause and could at any time have proceeded with it in due course. Neither engagements in Europe, nor absences elsewhere, constitute any excuse for not filing a *narr.* or statement. The affiant says he never abandoned the suit and always intended to have it tried, and never directed a suspension of proceedings. Such averments are of the most trivial and useless character. They are utterly at war with the actual facts of the situation, and as against those facts they avail nothing. If he did not direct a suspension of proceedings he certainly did suspend them, and practically abandon them, for an unprecedented period without the slightest reason or necessity.

We come then to the consideration of the mere question of the power of the court below to grant the nonsuit. In view of the undoubted facts appearing of record, it seems almost absurd to enter upon the discussion of such a question. When it is considered that a delay of only six years in the bringing of such a suit gives rise to an absolute bar to its maintenance, at the mere will of the defendant, it seems useless to consider whether the court in the exercise of its discretionary power, may not grant a nonsuit for a mere wanton delay of more than fourteen years in the prosecution of the suit. When it is further considered, that, by the rule of court now in force in Allegheny county, a delay of only three months in filing the declaration, authorizes the defendant, upon the mere *præcipe* of his attorney, to have a judgment of *non pros.* entered by the prothonotary, without any action of the court, or notice to the plaintiff, it is an extraordinary proposition to advance, that the court itself upon unanswerable cause shown and after a full notice to the plaintiff,

M. White, the original contractor, as principal, the condition of which was, "that if the said David M. White shall duly perform said contract then this obligation is to be void, but if otherwise the same shall be and remain in full force and virtue."

The literal performance of the original contract by the contractor, requires that there shall be no lawful claims against the contractor "in any manner from any source whatever for work or materials furnished on said works."

If now the plaintiff's testator held a claim as a mechanic's lien creditor against the building for work or materials furnished to the contractor and a recovery is permitted on it, his obligation as surety is broken and his estate must immediately make good the loss to the defendant. We held in *Benedict v. Hood*, 134 Pa. 289, confirmed in *Iron Works v. O'Brien*, 156 Pa. 172, that where the surety was himself a claimant to a lien on the building the lien could not be sustained because his suretyship must be deemed a waiver of any right of lien in favor of the surety. We have reviewed this subject and followed the same ruling in an opinion just filed in the case of *Rynd v. Pittsburgh Natatorium*, No. 229 Oct. Term, 1895 [*ante*, p. 54]. While there is some difference in the precise terms of the plaintiff's contract of suretyship between this case and that, there is no substantial difference in the legal effect resulting from both. It is inconsistent that one who agrees to guarantee that there shall be no lawful claims for work or materials furnished to the original contractor, shall himself be permitted to occupy such a position. He cannot be permitted to recover without violating his contract of suretyship and he must therefore be held to have waived the right to file any lien in the face of his contract. The reasoning in the opinion just filed controls the decision of the present case and therefore need not be repeated.

Judgment affirmed.

KLINFELTER et al. v. BAUM.

In *scire facias* on a mechanic's lien the sufficiency of the lien on its face cannot be attacked under a plea of *non-assumpsit*, set-off, and payment with leave.

Appeal of George W. Baum, defendant, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, upon a *scire facias* sur mechanic's lien brought by J. S. and J. G. Klinefelter. Pleas were *non-assumpsit*, set-off, payment with leave, etc.

At the trial counsel for plaintiff offered in evidence the record of mechanic's lien filed at No. 15 March Term, 1893. Objected to as incompetent for the following reasons:

First.—The lien on its face shows it was filed

December 31, 1892; there is no date or item given at the time of the completion of the contract, as appears upon the face of the lien. The last credit as given upon the face of the lien is payment of money on the 31st of July, \$100. The face of the lien shows a payment in excess of the contract price.

Second.—On the bill of extras attached to the lien for which this lien is filed, it is for the extras alone; there is not a solitary date or time given from the beginning of the bill to the close at what time any of the work was done or any of the material furnished, in all about eighteen or twenty items of extra work, contrary to the requirements of law which require a specific statement of the dates and times when the work was done, particularly with reference to a bill of extras.

By the Court.—The objections are overruled and bill sealed for defendant.

Verdict and judgment for plaintiffs for \$950. Defendant appealed.

For appellant, J. J. Miller.

Contra, L. K. & S. G. Porter.

Opinion by FELL, J. Filed January 6, 1896.

The error assigned is to the admission in evidence of the record of the mechanic's lien. The objection urged was based on the insufficiency of the lien as appearing on its face. The plea to the *sci. fa.* was *non-assumpsit*, set-off, payment with leave, etc.

In *Lybran v. Eberly*, 36 Pa. 347, it was held, following *Lewis v. Morgan*, 11 S. & R. 234, that the formal validity of a mechanic's lien is not put in issue by the plea of payment, and that no issue for the jury could be raised on the formal deficiencies of the claim, as they were questions of law and should be raised by demurrer or by motion to strike off the claim. Following this case it was decided in *Howell v. City of Philadelphia*, 38 Pa. 471, that pleading to the *sci. fa.* must be considered a waiver of defects as to dates in the lien. In *Lee v. Burke*, 66 Pa. 336, the plea was no lien, payment and set-off with leave, and it was said by SHARSWOOD, J.: "It was the issues of fact raised by these pleas that the jury were called and empaneled to try. No question of the sufficiency of the claim upon its face could arise at the trial. That would be an issue of law. There might arise a question of variance between the evidence as offered and the claim as filed and recited in the *scire facias*, but not whether that claim was regular and sufficient." And he adds that the short plea of no lien was not a demurrer general or special, and raised no question as to defects on the face of the claim filed. There

is no conflict between these cases and *St. Clair Coal Co. v. Martz*, 75 Pa. 384, where it was held that, as the Act of Assembly gave the plaintiff no such lien as was filed, the fatal error in the claim was not waived as a merely formal defect by going to trial on the issue of payment; and *Fahnestock v. Speer*, 92 Pa. 146, where the special plea concluded to the court, and was held to be in effect a demurrer.

The judgment is affirmed.

Superior Court, Penn'a.

OLES v. THE PITTSBURGH TIMES.

The defendant, a newspaper, published an article declaring that the neighbors of the plaintiff, a woman, said she was a witch and had bewitched a little boy. The paper circulated among people who believed in witchcraft. *Held*, that the article is a libel and actionable. In the above case it is no defense to show that the neighbors actually said what the paper attributed to them and the article itself in no way vouched for the truth of the statement that she was a witch. Every repetition of a slander is a willful publication of it. The above article is not a privileged newspaper article.

Appeal of *The Pittsburgh Times*, defendant, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action of libel in which Irena Oles was plaintiff.

On the trial of this cause before STOWE, P. J., the facts appeared as follows:

On December 4, 1893, *The Pittsburgh Times*, a daily newspaper published in the city of Pittsburgh, received and published the following article from its correspondent at Washington, Pa.:

"EXCITEMENT OVER ALLEGED WITCHCRAFT AT WASHINGTON.

"THE PARENTS OF A LITTLE BOY AND THE NEIGHBORS ATTRIBUTE WHAT THE DOCTORS PRONOUNCE A NERVOUS MALADY TO THE EVIL INFLUENCE OF AN OLD WOMAN.

"WASHINGTON, PA., Dec. 3.—West Washington is greatly excited over the strange case of 12-year-old John Newman, son of Henry Newman, who for a week has been affected by an ailment which many of the neighbors stoutly claim is witchcraft.

"The boy was sitting in a chair last Sunday at his home when his head fell forward on his breast and he pitched to the floor. No one was about the house but the mother and younger children, and by the time the neighbors were summoned he was found to be in spasms. Later he frothed at the mouth and barked like a dog. Dr. J. B. Irwin was called and rendered what aid was in his power and has since called Dr. Wray Grayson in consultation on the case.

"The *Times* correspondent visited the New-

man home this afternoon, but found the blinds tightly drawn and received no response to repeated knocks. The nearest neighbors told a story of superstition almost incredible regarding the boy's parents. The Newman family, as well as many neighbors, believe the boy is possessed of devils, and that an old woman who resides on Cherry alley, this place, named Oles, is responsible for his peculiar behavior.

"The Newmans will receive no strangers in their home and no one at all after the sun goes down. This they believe to be required of them by the witches. Mrs. Charles Ring, who resides opposite, shares the belief of the Newmans and thinks the boy is laboring under a strange spell brought on by contact with Mrs. Oles. The last named peddles medicine and often visited the Newman home.

"Mrs. Ring says she visited a witch woman in Pittsburgh Tuesday and received instructions how to treat the boy. She said they could not tell for nine days what the treatment would bring forth. She further said that a wild-looking colored man had been seen in consultation with Mrs. Oles.

"Mr. and Mrs. Ring lately moved here from Pittsburgh.

"The parents of the boy live in a very modest one-story frame house, the father working in a stone quarry.

"Dr. Irwin says the boy's trouble is of a nervous nature, but that he was undoubtedly greatly frightened by the old woman."

The plaintiff, on and before December 4, 1893, lived in Washington, and for some years had supported herself and granddaughter by her services as a nurse, especially of women and children, and to some extent by the sale of patent medicines. She was a woman of sixty years of age, and had no other means of livelihood than as stated; and her work as a nurse and in the sale of medicines was chiefly in the borough of West Washington, adjoining Washington borough proper on the west, and in a mining village about two miles or so to the north.

Some 52,000 copies of the newspaper were issued on the morning of December 4, and 175 copies were circulated among the people of Washington. Of which some copies presumably were delivered among the people of West Washington.

After the publication of the article the plaintiff's business as a nurse and as a vender of medicines was destroyed; she was driven from the doors of persons upon whom she called to make collections; she was insulted when she went to church; was called a witch; and on several occasions she and her little granddaugh-

ter were hooted at and stoned on the main streets of Washington, as well as on the country roads.

The court charged the jury as follows:

"The plaintiff's claim in this case is founded upon an alleged injury done her by the publication in *The Pittsburgh Times*, which has been given in evidence and which is alleged to be a libel, in legal terms. A libel as you heard stated, is any publication, either by signs, printing or otherwise, that is calculated to bring upon anybody public odium or contempt, or which is likely to injure them in their standing in society, in general terms.

"The allegation in this case is that this article imputes to the plaintiff, or insinuates or indicates to the person reading it that the plaintiff is what they used to call (and do call still, apparently, to my utter astonishment) a witch, that is to say, one who by direct communication, spiritual or physical, as it may be, with the devil, has a power to exercise an evil influence over other human beings.

"At one time it was the general belief that there were such things as witches, and the history of that matter is a very amusing one, apart from the tragedy connected with it in many cases. Amusing to us now, but a very serious matter in its time. It is said that at common law in England, to be a witch, assuming that there were such things, was a felony. In 1675, I think it was, in the twelfth year of the reign of Charles I., all previous statutes (there having been some before that) were repealed, and then it was made a felony punishable by death. To be a witch was a capital offense, and even so great a judge as Judge HALE, who was looked upon as one of the most merciful criminal judges, and the most learned that ever sat upon the bench up to this day, sentenced a woman to be hanged for the crime of witchcraft. And the most singular thing connected with the whole matter is that upon the scaffold, or drop, she actually admitted, as many of them did, that she had been guilty of witchcraft. But by degrees, when people became more intelligent and enlightened, that belief passed away, and in 1755, or 1756, an Act of Parliament was passed in England abolishing the offense. I believe those are the dates. They are near enough for the present purposes. The book says, under the head of witchcraft, defines the meaning, as understood at that time, of the terms conjurers, witches, sorcerers or charmers, as persons who shall use, practice or exercise any witchcraft, sorcery, charm or enchantment, or who shall use, practice or exercise any invocation or conjuration of any evil or wicked spirit. It is further said, 'The belief in the thing called

witchcraft having become obsolete it is now no longer an offense.'

"During the trial of this case it would strike me that if the author had been here he would have come to the conclusion that the belief in witchcraft hardly had ceased to exist. Probably most of you know that even in this country in Massachusetts, staid and sober old Massachusetts, more than one person was put to death for the crime of witchcraft.

"But it is no longer a criminal offense, and therefore to charge one with witchcraft is not what we call *per se* a libel. To charge one with a criminal offense is a libel in itself, and it does not make any difference, so far as the case is concerned, whether there was any actual or specific damage done or not. It is not for the jury, it is a matter of law for the court; it is the duty of the court to say where a charge is made of a criminal offense that it is libelous *per se*; and unless there is something by way of justification, it is the duty of the jury, if an action is brought, to give the plaintiff damages.

"But this case, standing as it does now, the charge not being of a criminal offense, it is not a matter of law for the court, but a matter for the jury to determine whether, under all the circumstances of the case, the imputation or suggestion or statement, if such there is by the fair and natural construction of this paper, that one is a witch is calculated to injure the reputation or standing or safety or business of a party so charged in society. If it is, then it is a libel because it is a publication the natural tendency of which is to injure and affect the reputation of another, and whenever a publication of that sort is made without some legal excuse shown for it—as I may say, by way of parenthesis, none is shown in this case—then it is a libel, and the plaintiff is entitled to recover damages.

"What the natural construction of this article is is for you. You have heard it discussed. You take it with you and read it. What is the imputation suggested.

"What would anybody believe from reading that article? Does it impute or charge this woman with being a witch? Is that such a construction or inference or conclusion as any ordinarily reasonable man would draw from that paper? If not, if there is nothing of that kind to be inferred, then, of course, the plaintiff has made out no case. But if that is the natural and fair construction of the article (and that is a matter for you, as I said before), then it is libelous, if to call one a witch in plain terms would be calculated to injure his reputation or standing in society.

"Now, when you come to that you have got

to take the world as you find it, and people who publish newspapers have got to take the people as they know them, or are bound to know them to be. If this was an article read in some society of learned men who did not believe in such things as witchcraft, or that there were such things as witches, probably it would have no effect at all; they would not believe it, and therefore it would do no harm. But you have heard the testimony, and you have your own knowledge on that point—a knowledge of the superstitions of the masses of the people, and if with that knowledge you are led to believe that being called a witch would be calculated to injure the reputation of another and injure his standing in society, then it becomes libelous and becomes the foundation for damages.

"As I said before, in considering that question you are not to treat it as you might have believed, you having no belief at all in witches; but you must consider it as you find a large number of people do believe, for you know very well that the days of superstition have not passed, and perhaps never will pass. There are plenty of people nowadays, and very intelligent people, too, who have superstitions of various kinds. I know some people whom I think very intelligent people who will not pass under a ladder that is standing against the side of a house. Well, I should not if I saw a man up there with a bucket of paint. That is not their fear, however; it is bad luck. Somebody upsets a salt cellar—I have seen it with many people at the table—the salt cellar picked up and some salt thrown over the shoulder; and a dozen other trifling things of that kind, that while the people do not really believe in them, yet there is some sort of apprehension or fear that there are certain things that produce or lead to some evil influence, or connected with them so as to be unlucky or unfortunate in bringing about things of that kind. The world is full of them, and particularly so of those who, like some of us, can trace a little Irish ancestry in our veins. I do not mean to find any fault with that kind of blood—I have some myself.

"Those are the ideas I wish to offer as suggestions with reference to the imputation of this article. [Was it such an article as naturally would create the impression that this woman was supposed to be, or was stated by her neighbors and these people about Washington to be, a witch? There is no pretense that she is a witch; that idea is absurd. The fact that these men who published this article were informed so is no sort of excuse if this imputation of being a witch would be naturally calculated to injure, whether intended or not, the reputation and

the business and standing of the plaintiff in this case. I want to put this certainly upon the record. If a man charges another, upon hearsay, with a serious offense, which if true would injure his reputation in society, if he gets the statement from somebody else, it is no defense, and he cannot undertake to escape by saying that somebody else told him it was so and that he believed it. If such was the law no man would be safe. (All you or I, or anybody that had a disposition to ruin a neighbor, would have to do would be to go and tell some one that such a man had committed an offense, from assault and battery to the most serious offense, and have it published broadcast throughout the country. Then when the paper—we being unknown—was sued, for them to prove that you or I had said it would be no defense. If that were so a man could stab another in the dark, until the only remedy would not be law but would be some other way of settling people who published articles of that kind. The fact is that the very basis of the criminal prosecution for libel is the tendency of the libel to produce a breach of the peace.) But in the civil side of the court it is different. It is true the truth of an allegation against another is a complete defense in a civil suit, but it must be the truth of the fact alleged, and not the truth that somebody told the author that it was so]. (Third assignment of error, except the portion in parenthesis.)

"We have been asked to say to you by defendant:—

"1. If the jury finds that the publication complained of is a substantially fair and true account of the matter therein referred to, plaintiff cannot recover and the verdict must be for the defendant.

"*Refused.* That simply means if the jury believe from the testimony that the statement was true, the fact, in other words, that the reporters got the substantial statement from somebody, and that the article merely told the truth, so far as their information was concerned, that it had been given to them in the manner in which it states, that it would be a defense in this case. As I said before, that is no defense. To make out a justification, whatever the charge is, the evidence must show that the charge is true, and the party cannot escape by proving that somebody else told him that it was true, and that he believed it. To make it a defense it must be supplemented by the fact that it was actually true. To illustrate: If anyone would say of one of you gentlemen that you had committed a criminal offense, and the reporter would publish that in the newspaper, stating

they had been informed you had committed a criminal offense and stating what it was, and you would sue them for libel, it would be no defense to prove that the party had said to this reporter or the party who published it that you were guilty of a criminal offense. That would go to the jury in one shape by way of mitigation of damages; but to be a complete defense it must be proven you were actually guilty of the offense alleged. (First assignment of error.)

"We are asked on the part of the plaintiff to say to you:—

"1. The publication complained of in this case, tending of itself to expose the plaintiff to hatred, contempt, ridicule or obloquy, to injure her in obtaining a livelihood in her occupation as a nurse and to cause her to be shunned or avoided by her neighbors and by those from whom she might otherwise have employment, is in law a malicious libel; and the plaintiff may recover damages unless the jury find that the publication was true, or unless it was privileged.

"Whether the article referred to is such as naturally tended to expose plaintiff to hatred, contempt or obloquy, or to injure her as stated in this point, is for the jury, and if they so find, it is a libel. This fact is for the jury to determine under the evidence in the case; but as a whole the point is refused. It asks us to say as matter of law that this is a libel. We decline to say it is a libel, but refer it to you to say what is the natural meaning and signification of this article, and whether its tendency is such as would naturally bring about inquiry, such as is complained of in this case. If you find that it is a libel and its natural effect was to injure the plaintiff, that gives the plaintiff a right to damages of some sort and to some extent.

"2. The malice that is an essential of an actionable libel, is simply malice in the legal sense, which exists where there is no lawful excuse for the publication, and though there may be no spite or ill-will or disposition to injure by it. Therefore, the words of the article complained of being actionable of themselves, the defendant must be taken to have intended the injurious consequences naturally and approximately resulting therefrom, and to be held responsible therefor, even in the absence of any intent to injure the plaintiff.

"*Refused.* Whether the article is actionable or not depends upon what the jury may find its natural effect upon the plaintiff as stated in answer to the foregoing point may be; we cannot say as a mere conclusion of law that the article is libelous. And upon that point it is just as well to say what our own Supreme Court has said: 'Any malicious publication, written,

printed or painted, which by words or signs tends to expose a person to contempt, ridicule, hatred or degradation of character is a libel, and the person libeled may recover damages, unless it be shown that the publication was true, or that it was justifiably made. Malice is said to be essential to an action for libel, but it is malice in a special and technical sense, which exists in the absence of lawful excuse and where there may be no spite or ill-will or disposition to injure others. Every publication having the other qualities of a libel, if willful and unprivileged, is in law malicious. The publication of words actionable in themselves, is sufficient evidence of legal malice. Legal malice exists where a wrongful act is done intentionally.

"3. It is not a valid defense in this action for the defendant to show that it is true that the Newman family, the neighbors or others, had stated, reported or believed of the plaintiff, the matters detailed in the publication complained of. To amount to a justification on the ground of truth, the defendant must prove the truth of the statements, reports and beliefs themselves, which it published of and concerning the plaintiff.

"*Affirmed.* This is a very clear and definite statement of what I have been in my general charge trying to impress upon the jury upon that point. (Second assignment of error.)

"4. [The publication by defendant of the article complained of is not privileged from liability as for a libel. There was no occasion for or duty upon the defendant to make the publication, nor was it of a matter or matters in which the public had an interest.] There could be no proper motive of the publication as it was made, and in the nature of the case no reasonable and proper cause. Moreover, even if the fact that the talk about the plaintiff existed, and it was a matter of interest to the public, yet the manner of the publication went beyond the proper statement of the fact, and deprived the publication of excuse on the ground of privilege.

"We decline to answer this point as a whole, as being complex and argumentative taken as a whole. The part in brackets, however, is affirmed.

"5. If the jury find a verdict in favor of the plaintiff the amount which they should return as compensation for the injury done to the plaintiff is to be measured by what they deem to be just, considering the plaintiff's injured feelings and tarnished reputation, and taking into account the nature of the imputation, the extent of its publicity, and the character, condition and influence of the parties; [and, if satisfied from the evidence that the defendant

by its publication wantonly and recklessly defamed the plaintiff, the jury may give the plaintiff exemplary damages.]

"*Affirmed*, except the latter part in brackets. We can see nothing in the case which fairly indicates the article was published under such circumstances as would justify exemplary damages. There is nothing in the case which indicated that the defendant published the article out of actual malice. As a whole the point is refused. To justify, as has been said by Judge TRUNKEY, exemplary damages there must be evidence of actual malice by the party charged. In this case there is no evidence of actual malice, and therefore we instruct you that your damages, if you find for the plaintiff, must be limited merely to compensation, and that compensation is based upon what is suggested in this point: 'Compensation for the injury done to the plaintiff is to be measured by what they deem to be just, considering the plaintiff's injured feelings and tarnished reputation, and taking into account the nature of the imputation, the extent of its publicity, and the character, condition and influence of the parties.'

"The case is submitted to you."

Verdict and judgment for plaintiff for \$600.

The defendant took this appeal and filed assignments of error as above indicated.

For appellant, *George C. Wilson and William D. Evans.*

Contra, *Boyd & E. E. Crumrine, J. P. Paterson and John H. Murdoch.*

Opinion by RICE, P. J. Filed July 16, 1896.

Any malicious publication, written, printed or painted, which by words or signs tends to expose a person to contempt, ridicule, hatred or degradation of character is libel; and the person libeled may recover damages, unless it be shown that the publication was true or was justifiably made: *Pitcock v. O'Niell*, 63 Pa. 253; *Barr v. Moore*, 87 Id. 385; *Neeb v. Hope*, 111 Id. 145; *Collins v. Dispatch Company*, 152 Id. 187. By this definition the alleged libelous matter must "tend," or, as it is sometimes stated, "be calculated" to injure. Were it not for the testimony in this case we might hesitate to believe that the article in question could, by any possibility, tend or be calculated to make the plaintiff infamous or odious, for the reason that it seems incredible that a belief in witchcraft should be entertained by anyone in this age. But the fact being established that such belief is still prevalent, to some extent at least, amongst that class of people to which the plaintiff belonged, a publication like the one in question would be quite as injurious in a legal sense

as if it had charged, in the same way, any common dereliction. The defamatory accusation need not be one which everyone would credit. We cannot state what we mean any more clearly than by quoting from the charge of the learned judge who presided at the trial: "Now, when you come to that you have got to take the world as you find it, and people who publish newspapers have got to take the people as they know them, or are bound to know them to be. If this was an article read in some society of learned men who did not believe in such things as witchcraft, or that there were such things as witches, probably it would have no effect at all; they would not believe it, and therefore it would do no harm. But you have heard the testimony, and you have your own knowledge on that point—a knowledge of the superstitions of the masses of the people, and if with that knowledge you are led to believe that being called a witch would be calculated to injure the reputation of another and injure his standing in society, then it becomes libelous and becomes the foundation for damages." This was a correct and plain statement of the law applicable to the case; for, strange as it may seem, there was ample evidence to warrant the jury in finding specially the following facts, if they had been requested so to do: *First*, there is and was a considerable number of persons living in the community where the plaintiff resides, and where the newspaper containing this alleged defamatory article had a large circulation, who believe in witchcraft. *Second*, the publication had a tendency to produce and assisted in producing in the minds of persons entertaining such belief the further belief that Irena Oles, the plaintiff, was a witch, and to produce in the minds of some such the belief that the malady from which the Newman boy was suffering was a possession of devils for which the plaintiff was responsible. *Third*, in consequence of this belief she was subjected to insults and assaults, was hooted at, called witch, and stoned upon the streets, was shunned by her neighbors, and suffered loss in her business and occupation. There being testimony that these things occurred afterwards and not before, it was for the jury to say how far the publication had a tendency to produce and did produce the false and injurious opinion entertained of her. Whether or not the defendant actually intended to accomplish this result is not the question. A man is supposed to intend the natural consequence of his own intentional act; therefore, it would be no defense for the writer to say that he did not suppose that the assertions made by the Newmans and their neighbors would be credited by others. It is not

claimed, and in the light of the evidence tending to establish the foregoing facts, it could not be seriously argued, that the court should have instructed the jury that the publication was not libelous. It was none the less libelous because it was a mere recital of what was believed and asserted by others.

Where there is no confidential relation, no existing duty, and no common interest, every repetition of a slander is a willful publication of it: *Odgers on Libel and Slander*, 162 Bl. ed. 124; 13 Am. & Eng. Ency. Law, 374.

In *Collins v. Dispatch Co.*, 152 Pa. 187 the newspaper did not assert that the plaintiff had been unduly intimate with the woman referred to, but only that complaints had been made to a public department that such was the case, and yet it was not suggested that the article was not libelous. But it is unnecessary to multiply authorities upon so plain a proposition. Indeed, it is not questioned in the assignments of error or in the argument.

Was it a defense to prove that the parents of the Newman boy and their neighbors said and believed that the plaintiff was a witch, and that his malady was caused by her malign influence? This is the only question raised by the assignments of error. The truth of defamatory words is a complete defense to a civil action of libel or slander. This is the generally accepted rule, although neither the justice nor the expediency of it is universally conceded. It is the rule in Pennsylvania: *Stewart v. Press Co.*, 119 Pa. 584-602. But the onus of proving the words are true lies on the defendant, and in general the whole libel must be proved true, not a part merely. If by this is meant that the defendant need only to prove the truth of what he asserts in the writing to be true, then it must be conceded that the defendant made out a good defense. The reporter asserted nothing as to the truth of what was said and believed by the Newmans and their neighbors, but, having stated what they said and believed and the facts which seem to have been influential in their minds, left the public to draw their own conclusions. But if the defendant must prove the truth of the defamatory charges and assertions to which he has given greater currency by repetition, then a good defense was not made out. The latter is the true rule and is the only one consistent with the other well established rule that one who, without the excuse of "privilege," repeats a defamatory accusation is deemed to have published it, and is liable to action, although he gives the name of the author. The fourth resolution in *Lord Northampton's Case*, 12 Rep. 134, which runs as follows: "In a pri-

vate action for slander of common person if J. S. publish that he hath heard J. A. say that J. G. was a traitor or a thief, in an action on the case, if the truth be such he may justify," has been discarded in England and by most of the courts in this country as neither authoritative nor sound in principle. It is now generally held that in the case supposed J. S. must prove that J. G. was a traitor or a thief in order to make a complete defense: *Odgers on L. & S.* 174; *Townsend on S. & L.* §§ 210, 211; 13 Am. & Eng. Ency. of Law, 376, 395; 2 *Addison on Torts* (Woods' ed.), par. 1146; *Pollock on Torts*, *218, 219. We have not undertaken to collect the cases upon the subject, but these are a few leading ones where the doctrine is held substantially as we have stated it: *McPherson v. Daniels*, 10 B. & C. 272-3 (21 E. C. L. R.); *Bennett v. Bennett*, 6 C. & P. *588; *Watkin v. Hall*, L. R. 3 Q. B. Cases, 396; *Kenney v. McLaughlin*, 5 Gray, 3; *Stevens v. Hartwell*, 11 Metc. 542; *Haines v. Welling*, 7 Oh. 253; *Dole v. Lyon*, 10 Johns. *447; *Hotchkiss v. Oliphant*, 2 Hill, 510. It is to be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel. Upon this principle it was held very early in the history of this Commonwealth that in a civil action for libel (it was suggested that there might possibly be a distinction between libel and slander) against a printer, his inserting the name of the author was no justification, though it might go to mitigation of damages: *Runkle v. Meyer*, 3 Y. 518. We are not aware that this ruling or the doctrine on which it was based has been questioned in any latter decision of the Supreme Court. The justice of the rule, and the reason in support of it are so clearly stated in the opinion of LITTLEDALE, J., in *McPherson v. Daniels*, *supra*, that we feel justified in making this extended quotation therefrom. He says: "The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to possess. Now a defendant by showing that he stated at the time when he published slanderous matter of a plaintiff that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another may have uttered upon a justifiable occasion. Such a plea does not show that the plaintiff has not sustained or is not entitled

in a court of law to recover damages. As great an injury may accrue from the wrongful repetition as from the first publication of slander; the first utterer may have been a person insane or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it."

We have thus far been speaking of publications for which there is no legal excuse. In his general charge, as well as in his answer to the plaintiff's fourth point, the learned judge instructed the jury that the publication was not privileged. As these instructions are not assigned for error, we might properly omit to say anything with regard to that matter, but in view of the suggestion made in the appellant's history of the case that the article on its face is but a plain recital of events which actually transpired in this community, and in which the public had an interest, it will not be out of place to add a few words upon that point. It is more than a mere recital of events; it is also a substantially correct report of what the Newmans and their neighbors believed and said of and concerning the plaintiff. Complaint is made not so much of the incorrectness of the report as of the false and defamatory character of the matter reported. To publication was not made upon any occasion that rendered a repetition thereof privileged upon the grounds of public policy. It is to be judged by itself and not in connection with some other transaction of which possibly it might have formed a necessary part, and of which as a whole it might have been to the interest of the public to be informed. Thus judged it was not a matter in which the public had any interest except that which arises out of idle curiosity and vitiated appetite for the sensational. The plaintiff neither held nor sought a public position, and stood in no such relation to the public as to make it important for them to know that the Newmans believed and said that she was a witch. No duty of perfect or imperfect obligation, legal, moral or social or otherwise, rested on the defendant to make that fact known to others. She was a harmless old woman whose livelihood depended on the good will and good opinion of the people of the community in which she lived. Instead of the occasion being one which made the publication proper for public investigation and information, the very fact that a few superstitious persons entertained the false and unfounded belief that she was a witch ought to have shielded her against a more extended circulation of the injurious rumor by

those who must have known that it was not founded on truth.

We are of the opinion that the court correctly held that proof that the parents of the Newman boy and their neighbors said and believed that the plaintiff was a witch and that his malady was due to her malign influence was not such proof of the truth of the publication as would constitute a defense.

The specifications of error are overruled and

The judgment is affirmed.

Circuit Court, United States,

Western District of Pennsylvania.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. DOHERTY.

The real name of the owner of land being George S. Doherty a mortgage thereon given by him in that name and duly recorded within a few days after its date bound the land as against a subsequent judgment entered against him by the name George Doherty although his recorded title to the land was in the latter name.

No. 2 Nov. T., 1896.

Sur exceptions to the marshal's return distributing the proceeds of sale.

Opinion by ACHESON, Cir. J. Filed August 28, 1896.

On the seventh day of October, 1895, the defendant, George S. Doherty, executed and delivered to the plaintiff, The Mutual Life Insurance Company of New York, his mortgage upon a lot of land situate in Allegheny City, Allegheny county, Pa., to secure a debt of \$10,000. The mortgage is in the defendant's proper name, George S. Doherty, and is so signed and acknowledged. It was recorded in the recorder's office of Allegheny county on the fifteenth day of October, 1895. On May 21, 1896, suit by *scire facias* upon this mortgage was brought in this court, and on June 8, 1896, a judgment therein for the sum of \$10,878 was entered in favor of the plaintiff. A writ of *levari facias* was issued upon the judgment and by virtue thereof the marshal sold the mortgaged premises. In and by his special return the marshal appropriated out of the proceeds of sale to the plaintiff in the writ, The Mutual Life Insurance Company, the amount of the judgment on the mortgage and interest.

William Rogers and Thomas J. Rogers, each a subsequent judgment creditor of the defendant, have filed exceptions to the marshal's return, the grounds of the exceptions being stated thus: "The marshal should not have distributed any portion of said fund to the plaintiff, because the plaintiff had no lien on said

land by virtue of its said mortgage, and especially it had no lien upon said land as against the judgments of the exceptants, said mortgage being made and executed by George S. Doherty and so recorded, while the legal title to the land described therein and levied on under such execution was at the time in George Doherty, as appears by the records of the recorder's office of Allegheny county in Deed Book vol. 825, page 597, the judgments of said exceptants being against George Doherty in whose name the legal title stood."

It will be perceived that this exception raises no question of personal identity; it is not asserted that George S. Doherty and George Doherty are different persons; nor is it alleged that the defendant's true name is not George S. Doherty. Having signed and acknowledged his mortgage in the name, George S. Doherty, the presumption is, that that is the mortgagor's real name. That presumption has not been rebutted. On the contrary, the proofs support the presumption. In disposing of the case, then, it is to be assumed that the defendant executed the mortgage in his true name.

The defendant derived title to said land by a deed to him from Maggie Mc. McKee, dated November 28, 1892, and recorded on April 20, 1893. In that deed the grantee, the defendant, is named George Doherty, without any middle initial letter.

On May 7, 1896, each of the exceptants—William and Thomas J. Rogers—entered judgment D. S. B. in the Court of Common Pleas No. 1, of Allegheny county, against the defendant, he being named George S. Doherty, the instruments upon which those judgments were entered being signed George S. Doherty. On May 23, 1896, each of the exceptants entered a second judgment D. S. B. in the same Court of Common Pleas against the defendant, he being there named George Doherty, for the same debt for which his prior judgment of May 7th was entered, the instruments upon which these latter judgments were entered being signed George Doherty.

The exceptants claim that as against their second judgments, of May 23, 1896, the plaintiff had no lien by virtue of its mortgage, because the recorded deed under which the defendant took title conveyed the land to him in the name of George Doherty. To this proposition I am unable to assent. I have examined the authorities upon which the exceptants rely and do not find that they sustain their position. In none of the cases cited was the state of facts such as exists in this case.

Here the admitted owner of land executed in his true name a mortgage, which was duly put

on record within a few days after its date. Undoubtedly, as between the parties thereto, the instrument operated to transmit to the mortgagee the legal title to the land: Act 27th May, 1715, *Purd.* 651, pl. 131; *Brobst v. Brock*, 10 Wall. 519, 529. Having recorded the mortgage within the prescribed time, the mortgagee complied fully with the requisition of the statute. Why, then, was it not an effectual security as against subsequent judgment creditors of the mortgagor? In signing the instrument was the mortgagor bound to omit the initial letter of his middle name, because of such omission in the recorded deed under which he had acquired title? Is the security of the mortgagee to be stricken down, because the owner of the land executed the mortgage in his real name? That, indeed, would be a surprising result. It is difficult to see how subsequent judgment creditors could be injured by what was done here. At any rate, there is no evidence whatever to show, that either of these exceptants was misled or was in anywise injured thereby. The case, then, is this: The mortgagee is prior in time, and has the legal right, and the exceptants have shown no equitable ground for postponing the lien of the mortgage.

Here I might rest the case. There is, however, another fact which ought to be mentioned. In the direct mortgage index the entry of the name of the mortgagor is "George S. Doherty or George Doherty." This is certainly conclusive against the exceptants, if the entry is valid. Presumably, it was the act of the recorder and was contemporaneous with the recording of the mortgage. I see nothing on the face of the entry to discredit it, and it has not been otherwise impeached. Now, the mortgage recites the McKee deed to the mortgagor as the source of his title, referring to the place of record of the deed by volume and page. Thus, the mortgage connects itself with the deed, and there is force in the argument, that the recorder was warranted in indexing the mortgage as he did. But I do not put my decision upon this entry. The merits of the case, I think, are with the mortgage creditor upon the grounds first above indicated.

And now, August 28, 1896, the exceptions of William and Thomas J. Rogers to the marshal's schedule of distribution are overruled and said distribution is confirmed; and it is ordered, adjudged and decreed that the fund appropriated to the plaintiff be paid to it, unless an appeal from this order should be taken within ten days.

By the Court.

For plaintiff, *James W. Collins.*

For exceptants, *Alex. Gilfillan and J. H. Beal.*

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PITTSBURGH, PA., SEPTEMBER 16, 1896.

Supreme Court, Penn'a.

GLASS v. RAUWOLF.

In replevin for a stock of goods, which defendant agreed to exchange with plaintiff for land, where the jury find that the trade was not induced by fraud on plaintiff's part, and also that the stock of goods was delivered to plaintiff according to contract, defendant cannot claim that he was injured by a refusal to charge that one may refuse performance of a contract which he thinks was induced by fraud.

Error in giving an instruction ignoring defendant's intention to pass title to the stock of goods was cured by subsequent instructions that the verdict should be for defendant unless he voluntarily, and without trick or artifice practiced on him, delivered possession of the goods, intending to invest plaintiff with the absolute ownership thereof.

Appeal of Leonard Rauwolf, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of replevin brought by J. E. Glass.

Defendant was the owner of a stock of goods in a store, and agreed to exchange the stock for certain land, the value of the stock to be fixed by appraisement, and the difference between the value so determined and the price of the land to be paid in cash. After the appraisement, an employee of plaintiff took possession of the store and stock of goods, but subsequently defendant returned, and took possession. The evidence as to whether a delivery of the goods was shown was conflicting.

For appellant, *W. B. Rodgers, Boyd Crumrine and Wise & Minor.*

Contra, James W. Prescott, W. W. Thomson and D. F. Patterson.

Opinion by STERRETT, C. J. Filed January 6, 1896.

One of the two main questions of fact presented by the testimony in this action of replevin was whether, in procurement of the agreement for exchange of defendant's stock of store goods for certain real estate of the plaintiff misrepresentation and fraud were practiced by the latter. The other was whether the goods were actually delivered by the defendant to the plaintiff, pursuant to the agreement. Both of these questions were submitted to the jury, on suffi-

cient evidence, in a fair and adequate charge, of which defendant has no just reason to complain. The verdict is necessarily predicated of their finding that there was no fraud, and also that the stock of goods was delivered to plaintiff according to contract. In view of these findings of fact, defendant could not have been injured by the refusal of his last point for charge, which was to the effect that a party has a legal right to refuse performance of a contract which he thinks was induced by fraud, even if his point had been properly drawn. The same remark is applicable to defendant's contention that the affirmance of plaintiff's second point ignored the question of defendant's intention to pass title to the property by the acts specified in that point. If this was error, it was cured by the subsequent affirmance of defendant's second, third and fourth points, wherein the jury were, in effect, instructed that their verdict should be for defendant, unless he voluntarily, and without trick or artifice practiced upon him, delivered possession of the goods in question, intending at the time to invest plaintiff with the ownership thereof absolutely and unconditionally.

When considered in connection with other parts of the charge, the remaining instructions complained of are free from error. There appears to be nothing in any of these specifications that requires discussion. We find nothing in the record, as presented to us, that calls for a reversal of the judgment; but, inasmuch as it does not appear that plaintiff's tender of performance on his part—by delivery of good and sufficient deeds of conveyance of the lands which he agreed to give in exchange for defendant's stock of goods—was properly kept up, he should not be permitted to issue execution on the judgment until such deeds are duly delivered to the defendant, or deposited in the court below for his use.

Judgment affirmed; and it is ordered that no execution shall issue thereon until the court below is satisfied that the plaintiff has performed his part of the contract as above stated, nor until leave of said court first obtained.

ROBERTSON et al. v. THE YOUGHIOGHENY RIVER COAL CO.

Where the mineral estate in land is severed from the surface by a conveyance, the owner of the former is bound to leave enough of the mineral in place to support the surface, unless the owner of the latter has released his right to support.

Appeal of The Youghiogheny River Coal Company, defendant, from the judgment of the Court of Common Pleas No. 1, of Allegheny

county, in an action of trespass brought by Andrew Robertson and Thomas Robertson to recover damages on account of the mining of coal beneath plaintiff's land in such away as to withdraw the right of support.

For appellant, *Petty & Friend*.

Contra, *J. S. Ferguson*.

Opinion by WILLIAMS, J. Filed January 6, 1896.

Our legal responsibilities grow out of the relations we sustain to each other. If it were possible for us to live in a state of absolute independence of all other persons, it would be possible for us to do as we pleased with our own without considering the natural consequences of our conduct as they might affect others. But such a state of independence cannot exist in civilized society. Our interests are so bound up with the interests of those about us that it is to the advantage of all that we should each recognize the relations we occupy towards each other, and the obligations that spring therefrom. The maxim, "*Sic utere tuo ut alienum non lædas*," expresses this general conviction in the form of a rule of civil conduct. It is in fact "the golden rule" applied to our business transactions, or to such of them as are within the reach of the law.

The cases in which it has been applied by the courts are too numerous for citation here, and embrace a wide range of subjects. It was held applicable to the owners of successive strata in the earth's crust in *Jones v. Wagner*, 66 Pa. 429, which appears to be the first case in which the obligations of the owner of the subjacent estate came before this court for consideration. We held in that case that where the mineral estate is severed from the surface by a conveyance, the lower estate passes to the grantee, subject to the servitude imposed upon it by nature for the support of the surface. The surface owes to the lower estates an easement or servitude for access. The lower estates owe to each other and to the surface an easement for support. The owner of the mine must leave enough of the mineral in place to answer the purposes of support for the surface, unless the owner of the surface has released his right to support. This rule has been recognized and applied in many cases, among which are *Horner v. Watson*, 79 Pa. 242; *Coleman v. Chadwick*, 80 Id. 81; *Carlin v. Chappel*, 101 Id. 348; *Williams v. Hay*, 120 Id. 485. This right to support may be released by apt words in a deed of conveyance (*Scranton v. Phillips*, 94 Pa. 15); but such release will not be implied from language that does not necessarily import it (*Williams v. Hay*, *supra*). The grant of a mineral estate, or of the right to mine, is a

grant of the right to penetrate the earth in search of the mineral stratum, and, when found, to quarry and remove the mineral in a proper manner. Such injuries as are the necessary result of this process do not afford a cause of action to the owner of the surface. If his springs are drained, or his well destroyed, as the natural result of the excavation made to reach and remove the coal, he has no right to complain. *Bainb. Mines*, 483; 15 Am. & Eng. Enc. Law. p. 588; *Turner v. Reynolds*, 23 Pa. 199. But a sale of all the coal under a tract of land is not in terms or by necessary implication a release of the right to surface support any more than the sale of the first story of a building two or more stories in height would be a release of the floor so sold from its visible servitude to the remainder of the building. The release must be, in either case, by express words or by necessary implication. It is thought that this rule has been qualified in the late case of *Coal Co. v. Sanderson*, 113 Pa. 126, but we do not so understand it.

The question presented in that case was whether, as between owners of land lying along a stream, the owner of the upper tract may open mines upon his land when the drainage therefrom must necessarily pollute the stream, and render it unfit for use by the lower owner. We held that the lower tract owed a servitude for purposes of drainage to the tract above it, because of its position; and that, while the owner of the upper tract was bound to the exercise of diligence in his effort so to use and develop his own land as not to injure that of his neighbor, still, if notwithstanding the exercise of reasonable care and precaution, injury was unavoidable, such injury would not sustain an action for damages. Within the lines thus stated, *Coal Co. v. Sanderson*, is an authority. Under some circumstances a refusal to apply it might work a practical confiscation of the upper estate for the benefit of the lower, notwithstanding the natural servitude under which the lower is placed by its position. On the other hand, to insist upon its application under all circumstances might result in a practical confiscation of the lower for the benefit of the upper. For myself, I would permit no general rule of this sort to work confiscation in either case, but leave to a court of equity the adjustment of the terms and conditions on which each could use his own so as to inflict the least practicable injury on the other. This court, however, is not disposed at present to modify the rule of *Sanderson's Case* as it is stated above. That rule has no application to this case. Here it is the owner of the lower or servient tenement who invokes it to

defeat a recovery by the owner of the surface, which is the higher and dominant. The rule stated in *Jones v. Wagner*, *supra*, is that which controls this case. The surface is entitled to support, unless its right thereto has been clearly released by the owner. The several assignments of error do not require a separate treatment. They are overruled, and the judgment appealed from is affirmed.

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SCHWAN et al. v. KELLY et al.
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Where vendees of land, claiming the right to rescind for fraud, tender a deed of reconveyance, and demand the repayment of the part of the purchase money paid, and the vendors deny the right to rescind, and then foreclose a mortgage given them by the vendees for the balance of the price, the judgment in the proceeding on the mortgage is not a bar to a bill subsequently filed by the vendees to rescind the contract and to obtain the return of the purchase money.

Appeal of Charles Schwan *et al.*, plaintiffs, from the decree of the Court of Common Pleas No. 2, of Allegheny county, on bill in equity filed against Joseph M. Kelly and John N. Moore to rescind a contract for the sale of real estate.

The case was heard on bill and answer, and the court entered a decree dismissing the bill.

For appellants, *James S. Young, S. U. Trent, A. Leo. Weil and C. M. Thorp.*

Contra, Knox & Reed and William F. & Charles S. Wise.

Opinion by FELL, J. Filed January 6, 1896.

The vendees in a contract for the purchase of land, claiming the right to rescind on the ground of fraud, tendered a deed of reconveyance and demanded the repayment of the part of the purchase money which they had paid. The right was denied by the vendors, who then caused a *scire facias* to issue on the mortgage which had been given them by the vendees for the unpaid balance of the purchase money. At the trial no defense was interposed, and under the judgment obtained the property was sold by the sheriff, and purchased by the plaintiffs in that action. A bill subsequently filed by the vendee to rescind the contract and to require the return of the purchase money was dismissed by the Court of Common Pleas on the ground that the judgment on the *scire facias* was an adjudication of all matters set up by the bill, and a bar to the proceedings.

The rule that what has been judicially determined shall not again be made the subject of controversy extends to every question in the proceedings which was legally cognizable, and applies where a party has neglected the oppor-

tunity of trial, or has failed to present his cause or defense in whole or in part under the mistaken belief that the matter would remain open and could be made the subject of another proceeding. A verdict and judgment in a suit on a mortgage establish the fact that the debt is due and preclude the defendant from setting up fraud as a defense in an action on the bond, and are conclusive on this ground in an action of ejectment for the land sold under the judgment (*Lewis v. Nenzel*, 38 Pa. 222), as are a former verdict and judgment for plaintiff in replevin on an issue of rent in arrears conclusive in a subsequent action in *assumpsit* for the same rent: *Cist v. Zeigler*, 16 S. & R. 232. So will the failure in an action to recover for the non-delivery of goods purchased estop the defendant in a suit for the price from denying the delivery: *White v. Reynolds*, 3 P. & W. 97. So also a judgment recovered against a physician for malpractice is a bar to a subsequent action by him for services in the course of which the malpractice occurred: 15 Barb. 67. The same principle controlled the decisions in *Haneman v. Pile*, 161 Pa. 599; *Bierer v. Hurst*, 162 Id. 1, and *Wilson v. Buchanan*, 170 Id. 14, where questions which had been decided on the merits at law were presented on the same grounds in equity.

In these cases and many others depending upon the same principle the precise question had either been decided by a court of competent jurisdiction or the judgment in the first suit had negatived by implication the foundation of the second. Generally the estoppel extends to any allegation which was at issue determined in the course of the proceedings which went to establish or disprove either the plaintiff's case or that set up by the defendant: *Stevens v. Hughes*, 31 Pa. 381; *Beloit v. Morgan*, 7 Wall. 618.

But a judgment is not evidence of any matter which comes collaterally into question, or which is incidentally cognizable, or which is to be inferred by argument from it: *Duchess of Kingston's Case*, 11 State Trials, 281. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters not actually heard and determined, nor to collateral questions which arise but do not become part of the case: *Hibshman v. Dulleban*, 4 Watts, 183; *Martin v. Gernandt*, 19 Pa. 124; *Kelsey v. Murphy*, 28 Id. 78; *Tams v. Lewis*, 42 Id. 402; *Schrivver v. Eckenrode*, 87 Id. 213. The estoppel of a former adjudication will extend only so far as the subject-matter of the second suit is substantially the same as that of the first, and may be binding on some points while leaving others open to controversy. Notes to *Doe v. Oliver*, 2

Smith's Lead. Cas. 768. In order to render a judgment effectual as a bar it must appear that the cause of action is the same in substance and can be sustained by the same evidence; and as between courts of law and courts of equity the rule does not apply unless the jurisdiction of the former is broad enough to cover the whole ground, nor where questions falling within the exclusive province of equity are involved.

The learned editors of White and Tudor's Leading Cases in Equity in the notes to the *Earl of Oxford's Case*, p. 1372, 4th Am. ed., citing *Boyce v. Grundy*, 3 Peters, 240, say: "To render the adjudication of one court conclusive in another the jurisdiction of the former tribunal must be broad enough to cover the whole ground and leave no essential point untouched and open for consideration. Hence, even when a defense is legally cognizable and might have been received in a court of law, it may be requisite to consider whether it could have been made fully and effectually, and if it could not recourse may still be had to chancery for a larger measure of relief than the law affords. That an action has been brought on a contract for the sale of land, and a judgment recovered against the vendee for an installment of the purchase money, will not therefore necessarily preclude him from filing a bill to have the execution of the judgment stayed and the amount paid or collected under it refunded, and the whole contract set aside as fraudulent; because although the fraud might have been pleaded or given in evidence as a defense to the action it would have only been an answer to the stipulation or covenant on which the suit was brought, and the defendant would still have been obliged to seek relief in chancery." In *Boyce v. Grundy*, *supra*, a bill was filed to enjoin the collection of a judgment at law for the purchase money of land and to rescind the contract on the ground of fraud. In the opinion of the court it is said that the defense of fraud might have been resorted to, yet was obviously not an adequate remedy because it was a partial one, and the defendant would still have been left to renew the contest upon a series of suits.

The proceeding on the mortgage was after notice by the vendees of the intention to rescind the contract on the ground of misrepresentation, and after the necessary steps preliminary to a resort to equity had been taken, by the tender of a deed and a demand for repayment. There was no ground consistent with this position on which a defense could have been made at the trial. The verdict and judgment on the *scire facias* determined the amount due on the mortgage, but left untouched matters in dispute

which were not, and could not have been, adjudicated. A defense at the trial would have been limited to the question at issue, and if successfully made could not have resulted in more than relief to the mortgage from the payment of the balance of the price secured by the mortgage. The remedy sought by the bill is distinct from this and of a much wider scope. It is the cancellation of the agreement and the repayment of the money paid. These are matters which come within the peculiar province of equity. They were not cognizable in the former action, and they are now open for adjudication in a tribunal which affords a wider measure of relief and where an adequate remedy may be obtained.

Some complications which may arise hereafter would have been avoided if the bill had been filed before the trial and a stay of proceedings had until the question of rescission had been decided. The record however presents the single question whether the judgment obtained on the *scire facias* is a bar to the equitable relief sought by the bill. We are of opinion that it is not.

The assignments of error are sustained and the order dismissing the bill is reversed and set aside, and the record is remitted to the Court of Common Pleas for further proceedings.

Court of Common Pleas No. 2.

IN EQUITY.

THE MANSFIELD COAL & COKE COMPANY v. THE ROYAL GAS COMPANY.

A. conveys the coal under his land to B., reserving the right to drill one well through the coal for the purpose of obtaining water and for no other purpose. The conveyance was made at the time when neither party probably contemplated the discovery of oil and gas in the strata below the coal. *Held*, that a court of equity will refuse an injunction restraining A. from drilling for oil and gas.

In refusing an injunction in the above case the court will require A. to drill at a point least likely to interfere with the mining of the coal and to use such appliances as will best protect the coal.

No. 596 July T., 1896.

EWING, P. J.

FINDING OF FACTS. Filed July 21, 1896.

There are but few questions of fact in dispute in this case, but a statement of the circumstances under which the questions arise is proper.

Moses C. Dunlevy was the owner of a tract of land containing about 23 acres, situate in Scott township, this county. The Mansfield Coal and Coke Company was the owner of a coal

mine, or mines, in the vicinity, already in operation, and, in its workings, approaching the land of Dunlevy. It also owned other coal adjoining Dunlevy and beyond his land. It owned, at that time, about 300 acres of coal, and, for the purpose of increasing its area of coal, purchased the coal under this land of Dunlevy, who, on the 20th day of January, 1888, made his deed, conveying the coal under the tract, reserving therefrom 67.9 perches of coal under his buildings, making a tract about 135 feet square. A copy of the deed is Exhibit "A" of the defendant's answer. The whole of Dunlevy's tract was underlaid with coal, and it was surrounded with coal then owned, or soon thereafter purchased, by The Mansfield Coal and Coke Company. The coal was purchased as a part of the mines, and to be used in connection with the other coal, composed of different tracts owned by the company, and operated and to be operated as the mine of the plaintiff. Dunlevy was fully acquainted with the situation; his coal was not available for mining except in connection with the other coal.

There are two facts connected with the law governing conveyances of coal which are well known to the court and bar, and generally known: one, that at the date of this conveyance, the general belief of coal men, owners of surface and of the profession was that the owner of the surface, having sold the coal, had no right to dig through it, or bore through it, without the consent of the owner of the coal; and another, which had long been acted on by coal men, by surface owners, by the legal profession and by the courts in this part of the State, was the belief that when the coal was taken out of its place the right of the owner of the coal in that part of the land ceased, and the whole belonged to the owner of the surface.

At that date developments for oil had taken place in some parts of Allegheny county, and there was probably a suspicion that oil might be found in the region of this coal; but no developments in the neighborhood had been made, nor, in the immediate neighborhood, have there been now. The well proposed by the defendant in this place would be called a "wild cat." It is an experiment. No oil in paying quantities has been found in the neighborhood.

The Mansfield Coal and Coke Company has, and had as early as 1894, carried three sets of what are known as double "butt" entries (as shown on the plan, Exhibit No. 1 in this case), through the Dunlevy coal and into the coal lying beyond, and it had mined out all the coal mined in what are termed "rooms" in the Dunlevy land, and had also mined out some of

the pillars and ribs in the entries marked 5 and 6 on Exhibit No. 1. When the mines shut down about a month ago, for want of profitable orders, the coal company was engaged in taking out the ribs and pillars supporting the butt entries 5 and 6, and intended, at an early day, to remove all those pillars and let down the surface at that point. The butt entries marked 7 and 8 (being a double entry) it maintained for its use in ventilating and draining its general mine, and with a view to, in the future, extend its rope haulage system in the mine for the transportation of the coal beyond. All the coal left in the Dunlevy tract consists of ribs and pillars which would now be drawn except for their prospective use in mining and transporting coal in other parts of the coal company's property; and the entries 7 and 8 are likely to be maintained for a considerable period of years and until the company has practically exhausted its present mine. The coal left there, and which supports the surface in that vicinity, consists of pillars and ribs as follows: There are two parallel passage ways, or entries, eight feet in width, supported by ribs and pillars of coal between them, about 30 feet in width and 120 feet in length, with narrow passage ways from entry to entry; and, on the outside of each entry, are a series of pillars of coal measuring about 21 feet by 25 feet, with narrow passages between, making a width of about 75 feet, including the entries, which is thoroughly well supported. The entire coal left in the Dunlevy tract is about three acres.

The defendant has located its machinery to drill a well between the entries marked 7 and 8 and 5 and 6, about 80 feet from the center of the nearest entry (8) and about 55 feet from the outside line of ribs supporting that entry. In that vicinity, and beyond these pillars, the slate above the coal removed has fallen in, and except for a very short distance of 10 or 20 feet beyond the pillars, the entire portion between the entries 5-6 and 7-8 is abandoned. In that space the pillars have been taken down, to let down the surface, and all entries and rooms have been filled up by falling material.

The defendant claims it has a right to drill for oil under a lease made to it by Moses C. Dunlevy, which is dated the 9th day of May, 1896, and a copy of which is Exhibit "B" of defendant's answer.

The plaintiff claims that the force and effect of the provision contained in the deed from Moses C. Dunlevy to it, to wit: "The said parties of the first part (Moses C. Dunlevy and wife) reserve unto themselves, their heirs and assigns, the privilege of drilling one well

through the coal hereby conveyed, to such depth as shall be reasonably necessary for the purpose of obtaining water, and for no other purpose; agreeing to case said well as soon as practicable after the same is drilled through said coal, with two lines or iron pipe, so as to shut off from said coal any water, oil or gas which might otherwise escape from said well into said coal, or the mines opened therein," is such that the defendant has no right to drill for oil in any part of the territory the coal of which was sold to plaintiff.

The plaintiff claims, in the second place, that the location proposed by the defendant is a peculiarly dangerous one.

The first question raised is a question of law, under the circumstances; the second question is one of fact.

The plaintiff claims that there has not been a complete falling or subsidence of the strata overlying the slate in the vicinity of this proposed well; that while the slate has fallen to a height of ten or twelve feet, or perhaps more, the overlying sandstone is intact and has not broken or fallen. It admits that it has fallen, and necessarily fallen, at a considerable distance away, but claims that there is not a total subsidence and that it is almost a certainty that there will be a further subsidence in the locality, not only liable but likely to result in what is called a "creep" in the hill, a lateral motion, or "squeeze" which would inevitably break off the pipes that would be put down.

Expert witnesses and other witnesses have been called on each side of the case, and the plaintiff alleges that there were no cracks on the surface, while defendant's witnesses testify to a continuous and large crack along the surface, in the general line of the support of these ribs and pillars and a subsidence on the other side of them, and the testimony of disinterested witnesses shows that there were such cracks in 1893 or 1894. They have filled up.

The weight of testimony and of reason seems to me to be with the general view of the plaintiff on this point, and we find that while there has been more or less subsidence of the upper strata in that place, the probabilities are that there has been no general break of the sandstone and superimposed strata along close to this line, and that the probabilities are largely that there will, within the next few years, be a further subsidence and fall, liable to, and very likely to, in its movement, affect any pipe that would be put down in this particular locality, and that a safer, and much safer, locality could be found.

If a place is found on the land where there

has been a breakage of the sandstone and superimposed strata, and a complete subsidence of the strata, we are unable to see that there would be any serious danger in drilling a well and putting down a pipe or pipes through the place formerly occupied by the coal and now filled with earth and rock, and protecting it against ordinary danger. If gas should escape into this portion where the coal has been mined out, even though the earth has fallen, it would still be dangerous for other parts of the mine, as it is undoubtedly true that even where filled up by falling rock or otherwise, fissures which will admit the flow of water and the flow of gas will remain, and will remain for many years. The expert witnesses on both sides say that it would be much safer and better for both the coal company and the oil company, if a well is to be drilled in this territory, that it should go down through one of the large pillars or ribs between the entries marked 7 and 8, and we find that to be a fact; and we also find that where gas in large quantities is struck, as it usually is in boring for either gas or oil, there is danger, and considerable danger, of it escaping, even with great care taken; but it is our opinion, and we find as a fact, that a well can be drilled through one of these pillars and cased and protected, and operated with reasonable safety to all concerned, and with, perhaps, about as great safety as gas is carried under a very high pressure through the streets of towns and cities and distributed to factories and works. To make the drilling and operation of a well through one of these pillars safe, and keep it safe, the pillars and ribs must be left intact while the well is operated; but from the testimony it is evident that the coal company will desire to keep these pillars intact in entries 7 and 8 for a much longer period than the ordinary life of an oil well. It has no desire for or intention of removing any portion of these pillars in the near future.

The reservation of coal by Moses C. Dunlevy under his buildings is on a different and almost the farthest point of the farm from this proposed location of the well. The opportunities for drilling on that, without interference with the coal company, are somewhat increased by the fact that there was an unintentional trespass on this reservation, and by amicable agreement and arrangement a considerable larger piece of coal was left upon an opposite side, so that the coal belonging to Dunlevy is, at its farthest point, about 80 feet from the house, and, while it would be a serious inconvenience to him and more or less of a danger to his buildings to have a well drilled there, still it is practicable to drill a well

on that reservation, as it now stands, with reasonable safety, if we judge by numerous cases that have been before this court, of applications for an injunction against the boring of wells in similar proximity to dwelling houses. We have found that the apprehension of danger from an oil well to a dwelling house is very greatly affected by the interest of the party in the well and in the dwelling house to be affected. If the party is the owner of the well and the dwelling house both, the danger seems to him a great deal less than if he happens to be the owner of the house and not the owner of the well.

The deed of Dunlevy to the coal company is made a part of these findings.

CONCLUSIONS OF LAW.

Two clauses in the deed for the coal in this case distinguish it from the ordinary conveyance of coal detached from the other strata:—

First.—The grant to the vendee of the coal of a right of transportation for coal mined from other tracts of land; and

Second.—The formal reservation of a right in the grantee to put down one well "through the coal" for water and for no other purpose.

In *Chartiers Block Coal Co. v. Mellon* and *Manfield Coal and Coke Co. v. Mellon*, 152 Pa. 287, cases that went from this court, it was ruled that, under proper restrictions, the owner of the surface, the man who has granted to another the coal under his land, has a right, apart from any reservation in the deed, to access through the coal to the strata underlying it. At the time that these cases were first before us the question was a new one in Pennsylvania, and the general impression of the profession had been that there was no such right of access to the strata below, where it had to go through the coal in place; but equally was it the general impression, belief and opinion that where it was in a portion of the land from which the coal had been removed, the owner of the surface would have such right. In these cases we have two opinions: one by the then chief justice and another by another judge of the Supreme Court. They came to the same conclusion for different reasons, and perhaps this is one of the class of cases in which the law must be a growth. As in those cases, we now are of the opinion that such a right of access to the strata below exists, not strictly under the old law and rules of a right of way of necessity, but in analogy thereto. It is a right of way by necessity, but the old principle and rules must be modified to suit the changed circumstances between a right of way through strata underneath and a right of way on the surface. We believe this to be the philo-

sophical, logical foundation of the right. In a court of equity, where an injunction is applied for, the court must also take into consideration the relative situation of the parties, and where the injury to the party complaining is slight if the act complained of is done, and to prohibit that act would be a great and serious injury to the other side, a court of equity will usually refuse an injunction. Were it not for the peculiar reservation clause in this deed, we would have no hesitation in determining that this defendant should be permitted, under proper restrictions, to drill through the coal to ascertain whether or not there be oil below.

The plaintiff claims that the reservation of a right to bore through the coal for water is an exclusion of all other rights to go through these strata. While we are well satisfied, taking into consideration the well known interpretation of the rights between the parties under such a conveyance of the coal as we have in this case, that neither party understood at the time the deed was made that there was any prohibition, or any necessity of a reservation in relation to the right of the surface owner to go through a space from which the coal had been taken out entirely, afterwards that part abandoned and closed up, yet this clause is entitled to consideration and force. If the plaintiff had no other coal beyond to bring out through this tract, by virtue of the right granted to it of "transportation for other coal from other tracts," and had drawn all these pillars which are left, and let down the surface wholly, it seems to us that its rights in the land would be ended and it would have no right to complain. This was, for a generation, the interpretation of the law, by courts, by the profession and by the coal men and owners of the surface, in all this region of this State, and it was not until the case of *Lilli-bridge v. The Lackawanna Coal Co.*, 148 Pa. 298, that this was changed, when, for the first time in this State, it was held that the purchaser of the coal, as the owner of the substratum, owned also the chamber or space enclosing it and had the legal right, while his ownership continued, to transport other coal through it. Yet, in the case of the *Chartiers Block Coal Co. v. Mellon*, *supra*, the chief justice, in delivering the opinion, although he cites this case in 148 Pa., still lays down the law as applicable to the case of drilling a well through the space, that when the coal has been taken out the rights of the vendee of the coal cease and the surface owner has the entirety. In *Stewart v. The Northern Coal and Iron Co.*, 147 Pa. 612, substantially the same doctrine is laid down, ignoring the case in 148 Pa. Perhaps the true rule

to be formulated from these apparently inconsistent decisions is that where the owner of the coal, either by pillars of coal left or by artificial support, keeps up the overlying strata and maintains an open way for transportation, ventilation or drainage, etc., in the space from which he has taken the coal, he has a right to the space so kept open; but that when he takes out all the coal from the whole or a portion of the land and thus necessarily lets down the strata belonging to the surface owner into and filling the space from which he has taken the coal, his right to such space is ended. This would be the reasonable rule. After the owner of the coal has deliberately taken out all the coal from a tract of many acres, and purposely let down the surface so as to fill up that space, it is difficult to see how he can claim any exclusive ownership therein. If this proposed well were in a portion of the Dunlevy tract in which it clearly appeared that the surface had been completely broken and the strata let down and the space from which the coal had been taken filled up, we would have no hesitation in refusing the injunction.

It seems to us that if the reservation in the deed is to be treated as a restriction of the right which the vendor, Dunlevy, would otherwise have had, to make the necessary borings to find oil below the coal, it can only be held to apply to going through the actual coal, or through some place where the space is necessary to the plaintiff's working.

The equities in this case are with the defendant. It may be that neither oil nor gas in any considerable quantity will be found. If so, it will do the plaintiff but little harm, and the well would be abandoned and necessarily filled up. If there be oil there the value to the defendant is far beyond the value of the entire coal in the tract.

While the evidence does not fully fix the place, or places, where the strata have fully broken and settled, I am of the opinion that there are such places that could be found. A complete investigation of that fact was rendered unnecessary by the declaration of the plaintiff and the assertion all through in this case, that if a well was to go down on the tract, it would prefer that it should be bored in one of these pillars between the entries; and the defendant has likewise expressed a willingness, if permitted to bore, to do so in one of the pillars to be designated by the plaintiff. To that extent the plaintiff yields its claim to a right to prevent a boring through the coal, by reason of the reservation contained in the Dunlevy deed.

It is proper, therefore, that the defendant

should be enjoined from proceeding to drill on the place selected and located, but that it be permitted to drill a well in such one of the ribs or pillars, between the two butt entries marked 7 and 8 on the plan, as shall be designated by the engineer of the plaintiff company, to wit, Mr. F. A. McDonald, and that it shall exercise great care in the manner of drilling its well and shall, in the usual and proper way, use three strings of casing, to run not less than 20 feet below the coal, to wit: a large string of 10 inch casing, in a 13 inch hole, a smaller 8½ inch casing within that, and a still smaller 6½ inch casing within that one, and shall protect, as far as practicable, its pipes from the dangerous waters of the coal measures and protect the mines from surface and other water by filling in the space between the 13 inch hole and the casing with liquid cement, and also by filling in the space between the outer a second strings of casing with cement or leaving that space open, as the said engineer of the plaintiff company shall direct; and also to use all other known and proper precautions and devices to prevent the escape of gas, oil or water into the mines of the plaintiff company by reason of the defendant's operations; and, should the well be abandoned, that the defendant shall carefully secure, by plugs and filling and otherwise, and by the known and proper devices shut off all gas, oil and water from access to the mines of the plaintiff, and shall let the outer casing remain.

The boring of this well may cause some damage or loss to the plaintiff and may cause no appreciable damage or loss. We have not sufficient evidence in the present hearing to fix the damage or determine what would be the proper compensation to the plaintiff, and we deem it best to hold that question for further consideration and decree, if necessary.

Further, the defendant should be restrained from boring any other well for oil or gas through the coal or the space formerly occupied by coal in this Dunlevy tract, held by plaintiff, until the further order of court. Should oil be obtained, it is probable that the defendant will wish to put down another well. The defendant and Moses C. Dunlevy are practically one in this matter, and if a second well should go down it would be a very serious question as to whether or not it should not go through the reserve coal on the farther end of the farm. The defendant should pay the costs.

Let a decree be drawn in accordance with these views.

For plaintiff, *W. R. Errett.*

For defendant, *O. R. Cooke, John W. Donnan, A. Leo. Weil and A. K. Stevenson.*

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No. 9.

PITTSBURGH, PA., SEPTEMBER 23, 1896.

Supreme Court, Penn'a.**MCCUTCHEON v. SMITH et al.**

The two members of a firm, after dissolution, in order to realize on a debt, purchased at judicial sale a farm which had been conveyed to the debtor's wife, each contributing one-half the price, and taking title to an undivided half interest. After holding the property together for ten years, one of them made a contract for the sale of the farm for \$8,500, and immediately after doing so, without disclosing the sale to his partner, he purchased the latter's half interest for \$2,500. *Held*, that the relation between the parties was of a confidential nature, so as to incapacitate the one from thus making a profit at the expense of the other.

Appeal of Mary Smith *et al.*, executors of George F. Smith, deceased, defendants, from the decree of the Court of Common Pleas No. 1, of Allegheny county, on a bill in equity filed by William McCutcheon for an accounting.

For appellant, *J. M. Shields.*

Contra, *A. Blakeley.*

Opinion by STERRETT, C. J. Filed January 6, 1896.

In 1867, William McCutcheon, the plaintiff, and George F. Smith, the defendants' testator, formed an equal copartnership in the name of George F. Smith & Co., which continued until April, 1876, when by mutual consent it was dissolved. One of the outstanding assets of the firm was an overdue account of about \$7,000 against Samuel Hare, which the latter was willing but unable to pay. Afterwards, with the view of realizing at least part of this, and other delinquent accounts, the late partners concluded to purchase the "Hare farm," the deed for which had been made to the wife of their principal debtor. They accordingly bought the same at judicial sale, each contributing one-half of the purchase money and taking title to an undivided half interest. As found by the learned master, "the purchase was made for the purpose of selling for the best price they could obtain, and out of the profits, if any, make up a portion or all of the loss they had jointly sustained while carrying on the business in the firm of G. F. Smith & Co." He also found that while each was authorized by the other to seek

a purchaser for the farm, Smith, with the consent of McCutcheon, was the more active in managing the place, and in endeavoring to effect a sale thereof; that in the purchase, ownership and sale of the common property the parties were equally interested and occupied a confidential relation towards each other; that during the existence of that relation Smith entered into a contract with J. G. Rolshouse whereby the latter agreed to pay \$8,600 for the farm. Immediately after doing so he went to McCutcheon and, without disclosing to him the fact that Rolshouse had agreed to give \$8,500 for the farm, succeeding in purchasing his undivided half and obtaining a conveyance thereof to himself for \$2,500. Smith received \$500 from Rolshouse on the execution of his contract, \$8,000 in about two weeks thereafter; and shortly after Smith's death the residue of the \$8,500, with interest, was paid to his personal representatives.

The facts above outlined, and other material, as well as strongly corroborating facts,—found by the learned master on abundantly sufficient evidence,—are clearly and concisely stated by him in his able and very satisfactory report, and need not be further referred to here.

In view of the facts thus conclusively established, the master was fully warranted in his conclusions that Smith's duty in the premises was to fully inform McCutcheon of the Rolshouse contract; that the relation of trust and confidence, which had so long bound them together, could not be severed by the one buying out the other's interest in the farm without first divulging to the fullest extent all the knowledge he possessed concerning their joint enterprise. Smith did not do this; on the contrary, at the very time he induced McCutcheon to sell and convey his half interest in the farm to himself for \$2,500, he had Rolshouse's agreement to pay \$8,500 for both interests, and adroitly concealed the fact until he accomplished his purpose.

If authority for the legal conclusions of the master, of which the decree is predicated, be needed it will be found in the cases cited by him; to which may be added *Swissahelm's Appeal*, 56 Pa. 475; *Rich v. Black*, 173 *Id.* 92, and cases there cited.

We find nothing in the record that would warrant us in sustaining any of the assignments of error; nor do we think that either of them requires discussion. In the circumstances, the amendment of plaintiff's bill was rightly allowed, and the testimony received and considered by the master was neither irrelevant nor incompetent.

There was no error in dismissing the exceptions to the master's report, nor in entering the

decrees recited in the fourth and fifth specifications.

Decree affirmed and appeal dismissed, with costs to be paid by the defendants.

KAUSS v. ROHNER.

The right to recover on a contract by which plaintiff was to have decedent's estate, upon the latter's death, in consideration of her services, did not accrue until the latter's death.

Act June 11, 1891, allows a surviving party to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between himself and one who testified against him at the trial, "or if such relevant matter occurred in the presence of such other living person." Held that, where a witness called by defendant administrator testified to a conversation which occurred in his presence between plaintiff and decedent touching the contract in issue, plaintiff was properly allowed to state what this conversation was.

In an action against decedent's estate for compensation for services rendered by plaintiff while living in decedent's family from childhood to maturity, it was error to charge: "If she [plaintiff] worked faithfully and honestly, what were her services worth to this old man and woman? On your oaths and consciences, on the spirit of honor and fairness, on the spirit of right and justice, what ought she to get from this estate?"—this setting up a wrong standard by which to estimate her wages.

Appeal of John Rohner, administrator of John George Kauss, deceased, defendant, from the judgment of the Court of Common Pleas of Butler county, in an action brought by Mary Kauss, to recover for services rendered to John George Kauss in his lifetime.

On the trial of this cause GREER, P. J., delivered the following charge, which contains the facts of the case:

"You have been sworn to try an action of *assumpsit* brought by Mary Kauss, the plaintiff in this case, against John Rohner, administrator, to recover the sum of three thousand dollars that she claims is due and owing her by this estate for services rendered Mr. John George Kauss in his lifetime, from 1876 up until the time of his death on the last day of last October, Halloween. The evidence shows that Mr. Kauss was murdered in his house that night; he is now dead and the affairs of his business are in the hands of his administrator, Mr. Rohner. This girl is now about twenty-five or twenty-six years of age, and she sets up that when a little girl her father and mother were not living together, that she was of no relation to Mr. Kauss, and that Mr. Kauss had no children, and that Mr. Kauss wanted to take her to his house, and that he made a contract with her mother by which if she remained until his death she should have all he had, his farm and everything else. Now,

gentlemen, the law does not enforce a contract of that kind in this way, that is, this girl could not recover the land and property, because the decedent, Mr. Kauss, did not will it to her or did not deed it to her, therefore she is at a loss in that respect because she cannot recover this property; but [the law says that where a contract of that kind is made, the law holds that it is not fair that a person should give his time and work under a contract and be paid nothing for it, but provides that where the man agreed to give his property to the girl at his death, if she performed her duty, and has gone and stayed with him and worked for him up until the time of his death, the law holds that would not be honest and fair to turn her out without anything, but allows her to recover honest, fair wages from the day she went there until the time of his death.] [If Mr. Kauss and the mother made an agreement that she was to go and stay there and work there and continue there until Mr. Kauss' death, if Mr. Kauss through negligence or without expecting to be called away failed to turn it over, the law says he must give to Mary whatever her services are honestly worth.]

"You have not a thing to do with the man over in the fatherland; it don't make any difference to you; you have not a thing to do with the widow; we have a duty to perform and if we undertake to reach outside to outside contracts we will get more on our hands than we can attend to, and we will be doing something that our oaths do not require; if this is a debt of Mr. Kauss he must pay it and must pay it because it is a debt. This girl offers this proof, and the burden of proof is on her, the burden is on her to show that there was a contract of some kind by which she was to go to this man's house and remain with him during his lifetime and perform and work according to that contract, and she must show that she did it, and when she has done that then she has complied with her part and she can recover. What was the contract? Mr. Kauss is dead; death has closed his lips; they are sealed forever; he is not here and he cannot tell what the bargain was; the law seals this girl's lips, therefore the proof must come outside of them. She puts on the stand her mother who says this; I will read from her testimony: 'Q. Did you have any conversation afterwards with him about it? A. Yes, sir, after she was there a while he came down and got me at Harmony, and when he was bringing me back he said if I would leave her with him until his death all he had should be hers, and what he had was hers. Q. Did he tell you what he had? A. The farm and all

he had. Q. Did you assent to this arrangement? A. Yes, sir.' [If what that lady says is true then there was a contract made on which this girl can recover unless she has in some way violated that contract.] Is it true? If it is not, we cannot receive loose declarations to others to establish contracts; there was the proof of Mr. Kauffman and Mr. Dunbar as to statements the old man made to them within the few last years as regards this property. If the mother had not made this arrangement this testimony would not be proper, but it is proper to support and corroborate her statement, and [if you believe that this old gentleman told Mr. Kauffman and Mr. Marburger and Mr. Ripper and Mr. McNiel and Mr. Dunbar that he was going to give this farm to Mary, it is strong corroborative evidence that he made the contract just as Mrs. Williams said he did; you have a right to take it for that purpose.] I said a minute ago that Mary could not be a witness to testify to anything that occurred in the lifetime of the decedent because he cannot tell what occurred, neither does the law allow her to tell, but a later act allows a party to testify or deny or explain a conversation that is alleged to have taken place between the witness and another party who is a competent witness to testify. [The defendant having put Mr. Seor on the stand to testify to a conversation he heard between Mary and Mr. Kauss relative to this contract, then the law allows Mary to come on the stand and tell her side of the conversation but nothing else. When Mr. Seor testified then Mary became competent, and you heard her statement.] [Let me say if there was a contract between Mary and her mother and Mr. Kauss, as Mrs. Williams says there was, and Mary went on and fulfilled her part, and was performing her part of the contract, and had done so for fifteen years, Mr. Kauss could not terminate it then after having received fifteen years of her work, but if Mary went away that was the end of it, but if Mary refused to go and stayed, the old man telling her to go would not terminate it, because you can easily see it would not be fair to receive the benefit of a contract for fifteen years and when he would not need her services much longer that he could terminate it and turn her out without anything, and if she was told to go, that would not terminate this contract unless Mary went away and gave it up.] [Mary had a right to say, 'I have a contract with you and I want my pay, and I cannot get it until you die and I am going to stay with you until you die.' You heard what she said as regards to what the old man did say. Is that true? If it is then she must recover in this case.]

"The defendant in this case is an administrator; he is one of the best men in our county, and more than that he wants to do what is his duty, and so far as he is concerned he is doing exactly right. The next question if you find there was such a contract, is how much are you going to give her. If he were worth a hundred thousand dollars she cannot get this property. She can only get what her services are worth, because the conveyance was not made to her in Mr. Kauss' lifetime. What was it honestly worth? You are here to measure out justice between these parties; you know neither of them; you like the estate as well as Mary; you should not like one better than the other; it is for you to decide how much Mary ought to get. [Mary worked on the farm and in the house; she worked from the time she was six years old until she was twenty-five; part of the time she went to school. The time she was away learning to sew would not be a forfeiture of this contract on her part; she was giving her services and you have a right to believe that she was learning to sew for the benefit of the family, to sew for Mrs. Kauss.] [She had no right to anything for services until the old man's death.]

"What were her services worth taking off the schooling she got and books and any medicine that there is any proof of and clothing, take it all off. [If she worked faithfully and honestly what were her services worth to this old man and woman? On your oaths and consciences, in the spirit of honor and fairness, in the spirit of right and justice what ought she to get from this estate?] [You heard the testimony of some very good men in the county; you heard the testimony of Mr. Marburger and Mr. Kauffman and Mr. Ripper; are they right? You are not bound to their statements.] [You heard the statement of the old gentleman on the part of the defense; are old men as liberal as young men? Have they gotten down to the idea that our people have as to wages? Give that honest consideration and render such a verdict as will give this girl every dollar that is due her honestly.] She got her clothing, and [you have a right to consider this that she was not to get any money until his death; suppose she had got wages would the interest in the long run amount to her clothing? Had she gotten her money every Saturday would it have come to what her clothing amounted to.] [You cannot go over three thousand dollars. You only go as far as the sworn proof will justify you; come down to the proof and say how much her services are worth; take it up and render a verdict and if you find for the plaintiff you say, we find for the plaintiff so many dollars. I will not fix

any amount; I would not suggest any amount; that is for you; that is about what I have to say to you.] As regards the statute of limitations, it was suggested that you could not go back further than six years. The law is this, that a man must collect his debts within six years after they are due, and if he does not he cannot collect unless he shows some promise to pay. [This money would not be due Mary until the old man's death. Suppose she had sued at the end of ten years she could not recover; why? because the contract was that she was to be paid at his death; the time did not come until the old man breathed his last, and if she can collect anything she can collect all.]"

The defendant submitted points which, with the answers thereto, were as follows:

1. The relation existing between the plaintiff and defendant was that of parent and child, the decedent stood *in loco parentis* to her, and unless a daughter can recover against her father's estate under the same circumstances, the plaintiff cannot recover in this action. *Answer*.—We refuse this point.

2. If the jury believes the plaintiff is entitled to recover anything at all, the jury must take into account the years when she was helpless and required the care and attention of the decedent to raise her to years of maturity, the value of her board, clothing, schooling, books and everything of that kind, and give her the difference between the value of these items and what they find her service to be worth. *Answer*.—We affirm that; that is the law.

3. The plaintiff having left the service of decedent and gone to work for herself at the trade of dress-making, she is not entitled to recover anything after that time, unless she has shown an express contract on the part of the decedent to pay her for such services after that time. *Answer*.—It is for the jury to determine whether she failed to perform her part of the contract with Mr. Kauss; if she has failed she cannot recover, and going to learn the millinery trade would not be a non-performance of that contract unless she had broken off her contract.

4. There can be no recovery for any services rendered the decedent that were not performed within the last six years prior to the bringing of suit. *Answer*.—That is refused, because she could not sue to collect any time until after Mr. Kauss' death.

5. The proof offered by plaintiff in support of her claim, consisting as it does of alleged admissions and declarations of the decedent to third persons does not come up to the standard laid down by the Supreme Court in similar cases, and under all the evidence the verdict of

the jury should be for the defendant. *Answer*. We refuse that.

6. The only evidence offered by the plaintiff as to the time of payment being that decedent would will his farm to the plaintiff, this of itself would not suspend the running of the statute of limitations against her claim. *Answer*.—If the decedent told Mrs. Swager, the mother of Mary, that if she would leave Mary with him until his death all he had should be hers and what he had was hers, and she agreed to this and Mary stayed with him until his death under this arrangement, the statute of limitations would not commence to run until after the death of the decedent.

"Now, gentlemen, bring in a verdict right and just between these parties; if you find there was no contract or if you find there was a contract and Mary did not comply with it, then the verdict should be for the defendant; but if you find there was a contract as she said there was, and, if you believe that Mr. Kauss recognized it as a contract, then it would be your duty to find a verdict for the plaintiff for the value of the services, whatever they are, less whatever he gave her in the way of clothing and expenses."

Verdict for the plaintiff for \$3,000, and judgment thereon. The defendant took this appeal and assigned as error the admission of the plaintiff as a witness, the refusal of the defendant's points and those portions of the charge enclosed in brackets.

For appellant, *W. H. Lusk*.

Contra, *Lev. McQuiston* and *J. C. Vanderlin*.

Opinion by FELL, J. Filed January 6, 1896.

While much of the testimony intended to establish a contract to compensate the plaintiff for the services she rendered the decedent consisted only of the proof of loose declarations of testamentary intention, there was enough that was direct and positive to justify the submission of the question of the existence of a contract to the jury. Proof of the contract did not entitle the plaintiff to recover the value of the estate: *Hertzog v. Hertzog*, 34 Pa. 418; *Graham v. Graham's Executors*, 34 Id. 475; *Pollock v. Ray*, 85 Id. 428. But it overcame the presumption arising from the existence of the family relation that the services were performed without the expectation of reward, and enabled her to recover on a *quantum meruit* the reasonable worth of her services. As the right to compensation did not mature until the death of John Kauss, the statute of limitations interposed no bar to the recovery of any part of the claim.

It was not error to permit the plaintiff to

testify. A witness called by the defendant had testified to a conversation which occurred in his presence between the plaintiff and the decedent touching the contract relation between them. In contradiction of this testimony the plaintiff was allowed to state what this conversation was. Her examination was limited to the conversation which had been detailed by the preceding witness, and no new matter was introduced. By the Act of June 11, 1891, a surviving party is made competent to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between himself and a person who is living and who testifies against him at the trial, "or if such relevant matter occurred in the presence or hearing of such other living and competent person." To this should be added the construction given in *Roth's Estate*, 150 Pa. 281, that the surviving party is not competent unless the living witness has been called, and then to such matters only as he has testified to. The act applies to conversations or occurrences which took place in the presence or hearing of the witness who has testified and whom it is proposed to contradict. *Thomas v. Miller*, 165 Pa. 220. See also *Krumrine v. Grenoble*, Id. 98. The living witness to the conversation between the decedent and the plaintiff having testified, the plaintiff was competent to contradict him and to state her recollection of what was said.

The plaintiff's claim was not without substantial merit, but she was entitled to recover, if at all, only upon her strict legal standing, and to the extent of the market value of the services which she performed. The case belongs to a class requiring the most thorough scrutiny, and in which jurors should be carefully instructed and restrained. In this respect we feel constrained to hold that the charge of the learned judge was inadequate and to some extent misleading. That portion of the charge which is the subject of the seventeenth assignment of error set up a wrong standard by which to estimate her wages, and instead of confining the jury to the proper grounds for recovery, tended to incite them to follow their own inclinations and to do what the decedent had failed to do, give the plaintiff practically the whole estate. In addition to board, clothing, care, education and full maintenance the verdict gives her wages at a rate exceeding three dollars a week from the time she was six years old, and for no reason more apparent or convincing than that given by one of her principal witnesses to justify his estimate of the value of her services, that "she ought to have it." This result could not have been reached by any fair calculation, and

we assume that it would not have been if proper instructions had been given.

The standard was the market value of what she had furnished, and to this the jury should have been confined by clear, distinct and guarded instructions; and they should not have been permitted under color of wages to have found the value of a bargain which she could not, and was not attempting to enforce.

The seventeenth assignment of error is sustained, and the judgment is reversed with a *ventre de nova*.

Court of Common Pleas No. 1.

PITTSBURGH & BIRMINGHAM TRACTION CO. v. MONONGAHELA BRIDGE CO.

A traction company makes an agreement with a bridge company, whereby the traction company builds an addition to a bridge for the use of its cars, and it is to be repaid its expense therefor in annual reductions of toll. All the stock of the bridge company is sold to the city of Pittsburgh and the company reorganized with the election of city officials as officers, and the bridge is made free. The traction company sues the bridge company to recover the money expended. Judgment for defendant.

No. 530 June T., 1896.

Opinion by STOWE, P. J. Filed September 14, 1896.

Without entering into detail as to the powers of the plaintiff and defendant under their respective charters, it is sufficient to say that under the facts agreed upon and herewith returned and made a part hereof, they were fully authorized by their charters to do all the acts and to enter into all the agreements involved in the disposition of this case.

The contracts between the defendant and plaintiff were admittedly such as they could make, and in pursuance thereof the defendant reconstructed its bridge so as to provide a good and sufficient passage or roadway, to enable cars to cross upon double tracks, propelled by electricity or traction, according to the plans and specifications made part of said contracts. Under said agreements the plaintiff was to furnish the money to defendant with which the defendant was to pay the cost of reconstruction, not exceeding \$185,000, to wit, \$50,000 to be deposited by the plaintiff to defendant at the time of the execution of the contract; an additional installment of \$50,000 to be deposited in like manner upon three days' notice in writing from the treasurer of defendant "in order to meet the payments for said reconstruction," etc., and to be checked out and used for that purpose by

said treasurer of the party of the first part. And the money thus paid by said party of the second part (plaintiff) is to be in payment of tolls in advance for crossing said bridge by the cars of said party of the second part, and being advanced is to bear a rebate, drawback or interest at the rate of 5 per cent. per annum, to commence to run as soon as the cars are in operation and running over the bridge, but this money advanced as tolls and rebate, drawback or interest thereon is to be recouped or offset and liquidated by tolls, in the following manner:

"The tolls shall be 7½ cents for a single trip or passage, etc., etc. Then follows a provision that the tolls shall aggregate not less than \$15,000 per annum for seven years, and \$17,000 thereafter during the term of the contract, and another in reference to settlements every six months. The agreement then declares: "6th. It is understood and agreed that this contract shall expire at the end of forty years from this date, and if the amount expended for reconstruction is not then fully extinguished by reason of increased revenue from said tolls, the unpaid portion shall be cancelled."

The cost of the reconstruction of the bridge by the defendant exceeded \$200,000. The plaintiff fully complied with its portion of the contracts and have ever since been using said bridge as provided for in said contracts, and the defendant has also fully carried out its part of the same, and now avers that it is willing and able to continue to do so.

It appears, however, that in April, 1896, the city of Pittsburgh purchased and paid for the entire capital stock of the bridge company (and that the same, except thirteen shares, which is in the name of thirteen of the officials of the city), subject to the rights arising under said contracts and also a mortgage upon the bridge itself.

Of course, whether there was an agreement to that effect in terms or not the city in purchasing the stock as it did would take it subject to the obligations of the bridge company arising under the agreements referred to.

The question now arises, has the plaintiff a right to recover back a portion of the money advanced by it to the defendant? The amount (if anything) is admitted to be \$152,583.31 with interest from 12th April, 1896.

It may possibly be that the franchises of the defendant company are no longer in existence and that all the city gets by the purchase of the stock is nothing more than she would have gotten under the condemnation proceedings under the Act of Assembly, and that in fact there is no bridge company except the one from which

the city purchased, but if so how can it affect the case in favor of the plaintiff? It sues the defendant as the rightful corporate company. We cannot inquire, so far as I can see, what right we have to inquire into who constitute the stockholders. A judgment against the company would be good against whoever owns the stock, and the question as to whether there is any longer a corporation vested with the franchises of the Monongahela Bridge Company, having all its rights and being bound by its contracts is liable to refund plaintiff the money claimed by it. Of course, if any set of individuals had purchased the stock the claim would have no force whatever, and I do not see how we can here treat this as any other than the ordinary sale of all the stock of a corporation by one set of owners to another. Whether or not under condemnation proceedings, where the actual value of the bridge and its franchises could have been taken, the lien of the mortgage and all other contract rights would have divested, and if so, the right of parties interested to be compensated out of the fund is apart from anything involved in this case and is not entitled to our consideration.

The act contemplates acquisition by agreement, and there seems to be no restriction upon the city making its own terms. And even if we treat this as a purchase by the city of the *corpus* of the bridge only, without the franchises belonging to the company, passing by the sale, it seems to me that the plaintiff would have no right to recover in this action.

So whether we treat this as a case against the legally constituted Monongahela Bridge Company, of which the city is the stockholder, or as substantially a suit against the city as the purchaser of the mere physical structure pertaining to the bridge, I am of opinion that plaintiff cannot recover and therefore is entitled to judgment against plaintiff in favor of defendant with costs of suit.

The points of law submitted by the defendant are all affirmed.

For plaintiff, *A. W. Duff*.

For defendant, *D. T. Watson*.

Orphans' Court.

In re Estate of JOHN F. VOGEL, Deceased.

The prayer of a petition to admit a subsequent will to probate necessarily implies a revocation of the probate of a prior will.

Two brothers signed a paper as follows: "In case one of us should die our money shall fall to the one is living." Held, that it was a double will, revocable by both.

R., sole legatee, surrendered the will to V., sole legatee under a former will of the testator, upon the verbal agreement that V. at his death would give R. all his estate. V. died, having bequeathed all his estate to others. *Held*, that R. could not probate the lost will, and that his remedy was against V.'s estate for breach of the agreement.

Sur appeal from the decision of the register.

OVER, A. J.

STATEMENT.

John F. Vogel, a bachelor, died testate April 4, 1892. By a will dated and executed April 23, 1887, he gave all his estate, consisting of personalty only, to his brother, Jacob Vogel, and appointed him and E. Y. Breck, Esq., executors. Jacob Vogel, at the same time, also executed a will in which he gave all his estate to his brother John F. It is alleged that this was done in pursuance of an agreement between them.

On December 9, 1891, John F. Vogel executed another will, in which he gave all his estate to his cousin, Gregor Reith. Either shortly before or after the death of John F., Jacob Vogel procured this will from Gregor Reith, upon the promise, as testified by Reith, that "if I would give him this will when he died he would give me this will back, and his possessions with it." After obtaining it Jacob Vogel destroyed it, and had the will of April 23, 1887, probated on April 12, 1892, and letters were issued to the executors named in it. They filed a final account on June 5, 1893, upon which a decree was made September 20, 1893, distributing the balance in their hands, \$3,454.81, to Jacob Vogel, sole legatee. He died (a bachelor) on July 10, 1894, having made a will, dated first day of June, 1894, in which he appointed Rev. Louis Guenther his executor, and gave his estate, consisting of personalty only, to various churches and charitable institutions. On January 15, 1895, Gregor Reith presented a petition to the register, praying that a copy of the will of John F. Vogel, dated December 9, 1891, destroyed by Jacob Vogel, might be admitted to probate. A citation was issued and served on the executor and legatees under the will of Jacob Vogel, deceased, answers were filed, and the register proceeded to take testimony. On February 7, 1896, Gregor Reith filed a supplemental petition, praying that the decree admitting the paper of April 23, 1887, executed by John F. Vogel, to probate as his will, be vacated; a citation was issued upon this petition and E. Y. Breck, surviving executor of John F. Vogel, accepted service February 8, 1896, *nunc pro tunc*, as of January 14, 1895. After hearing the register vacated the probate of the paper of April 23, 1887, and admitted to

probate a copy of the paper, executed December 9, 1891, as the last will of John F. Vogel. From which decree Rev. Louis Guenther, the executor of Jacob Vogel, and the legatees under his will take this appeal.

OPINION. Filed September 17, 1896.

The petition presented to the register did not pray for the revocation of the decree probating the paper of April 23, 1887; and as the amended petition praying for its revocation was not filed for more than three years, after the probate, it is claimed by appellants that the probate was then conclusive as to the personalty, which comprises the whole of the decedent's estate. The original petition refers to the probate of the paper, avers that it is not the last will of John F. Vogel, but that he made a later will in which the petitioner was the sole legatee, that it was destroyed by Jacob Vogel, and prays for a citation upon "the devisees and executor under the will of Jacob Vogel, deceased, to show cause why the said last and lost will of John F. Vogel should not be proved and probated." The citation issued upon this petition was duly served upon the executor of Jacob Vogel, and the legatees under his will. As the executors of John F. Vogel, under the will probated, had fully administered his estate, and even if they had not, were only stakeholders, it was not necessary to make them parties; the executor and beneficiaries under the will of Jacob Vogel, deceased, the sole legatee, were the only persons interested, and the executor the necessary party to the proceedings. The pleadings would have been in better shape and conformed to the proceedings in *Hoopes v. Thomas*, 143 Pa. 446, and *Hoopes' Estate*, 152 *Id.* 105, had the petition also prayed for a revocation of the former probate; but as the prayer to admit the copy of the lost last will to probate, necessarily implied the revocation of the former decree, we think the subsequent proceedings to amend were unnecessary.

Appellants offered in evidence a paper, without date, signed by Jacob Vogel and John F. Vogel, for the purpose of showing that the wills executed contemporaneously by them in favor of each other, were executed in pursuance of an agreement between them, and claimed that John F. Vogel's will was irrevocable. This paper is written partly in English and partly in German. The English part is as follows: "In case one of us should die our money shall fall to the one is living." The paper is testamentary, and not an agreement, but a double will. "It must be construed and treated as the separate will of each testator who signed it, in

the same manner as though a separate copy had been executed by each. It was therefore revocable by both:" *Cauley's Estate*, 136 Pa. 640. It is highly probable that they executed wills in favor of each other in pursuance of an arrangement between them, but there is no evidence of an agreement which would make them irrevocable.

It is alleged by appellants that when the decedent executed the paper of December 9, 1891, he did not have testamentary capacity, and that Gregor Reith, exercised undue influence upon him, and an issue is demanded as to these questions.

It appears from the testimony of three physicians, connected with the St. Francis Hospital, that when the testator was admitted to it, nine or ten days after the execution of the paper, he did not have testamentary capacity. They never saw him, however, prior to that time, and as it appears from the testimony adduced by the proponent, that he had testamentary capacity when the paper was executed, and there is no evidence as to undue influence, an issue cannot be awarded.

The most difficult question in this case seems to be the effect of the agreement under which Gregor Reith surrendered the paper of December 9, 1891, to Jacob Vogel. Reith and the two witnesses who were present when it was surrendered speak and understand English imperfectly, and their testimony was taken through an interpreter. So rendered it is not very clear, but there can be little if any doubt that the agreement was that if Reith would surrender the will in which he was sole legatee to John Vogel, that he might take under the will in which he was sole legatee, that he would at his death give Reith the whole of his estate. It seems to be founded upon a valuable consideration, and although verbal, as both Jacob's and John F. Vogel's estates consisted of personalty only, would not be void for that reason. In *Fisher v. Strickler*, 10 Pa. 348, it was held that "an agreement by deed between two persons who were brothers, that in the event of either dying without issue, etc., the survivor should be his heir and take and enjoy his property is a covenant to stand seized to uses and the survivor is entitled to the land. And in *Taylor v. Mitchell*, 87 Pa. 518, and *Carson v. Cemetery Co.*, 104 Id. 582, it was held that a covenant in a written agreement under seal, that the covenantor would not, by deed, etc., prejudice or interfere with the rights of his heirs at law, was valid. There is no apparent reason why a distinction should be made between an agreement relating to the disposition of realty after the

covenantor's death, and one relating to the disposition of personalty, and unless this agreement is contrary to public policy, it seems to be valid. In the Am. & Eng. Enc. of Law, vol. 3, pages 879-881, it is said that "agreements relating to proceedings in civil courts involving anything inconsistent with the full and impartial course of justice therein, though not open to the charge of actual corruption are void."

In the cases cited to support this proposition the agreements were either prejudicial to the public, or the rights of third parties. Here, however, the public was not interested, and the agreement was made between the only parties interested under either of the wills. The result would have been the same, if the will of December 9, 1891, had been probated and Reith had assigned his interest as sole legatee to Jacob Vogel, and the transaction was virtually an assignment. The agreement does not appear to contravene public policy, and if valid Reith should not be permitted to prove the will in violation of it and impeach the decree of distribution made in pursuance of it. His remedy seems to be against the estate of Jacob Vogel for its breach. If, however, the agreement is invalid, it may be that Reith should not be permitted to prove the will in controversy. He voluntarily surrendered it relying upon Jacob Vogel's promise alone, knew of the testator's death, and the existence of the former will, permitted it to be probated, and the estate to be distributed under it without objection on his part until nearly three years after the probate and sixteen months after the decree of distribution. It is at least doubtful in view of these facts whether the decree of the register and of this court should be vacated at his instance. His position seems to be analogous to that of a grantee who voluntarily without any misapprehension or mistake consents to the destruction of a deed or surrenders it with a view to revert the title in the grantor, and it has been held in *Mussey v. Holt*, 24 N. H. 252; *Potter v. Adams*, 125 Mo. 118, and *Speer v. Speer*, 7 Ind. 178, that such a grantee is estopped from asserting title under the deed.

The decree of the register is therefore reversed.
For appellants, *George E. Shaw* and *W. J. Curran*.

For appellee, *Ammon Brothers*.

—Loss of public money by a bank failure is held, in *Fairchild v. Hedges* (Wash.), 31 L. R. A. 851, to be no excuse for failure of a county treasurer to pay over the money. The conflict of authorities on this subject continues quite evenly balanced.

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PITTSBURGH, PA., SEPTEMBER 30, 1896.

Supreme Court, Penn'a.

SCOTT v. ALLEGHENY VALLEY RY. CO.

While a car containing binding twine was in the freight yard of a railway company ready for unloading, a fire broke out in a building twenty-three feet away, situated on property, on the other side of an alley, not belonging to the company. The car was then moved promptly, but in the meantime, and within twenty minutes of the breaking out of the fire, the twine caught fire from sparks entering through the car door, which had been left open about ten inches. Held, that the leaving open of the door was not the proximate cause of the loss.

STERRETT, C. J., dissenting.

Appeal of I. W. Scott & Company, plaintiffs, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in favor of the Allegheny Valley Railway Company, defendant, *non obstante veredicto*, on point reserved.

The facts are stated in the opinion of the Supreme Court. The court below having in an opinion by EWING, P. J., entered judgment for the defendant, plaintiff appealed, assigning as error the reserving of the question of proximate cause when the fact of the negligence of the defendant was in dispute, and the entry of judgment on the question of law reserved after having submitted to the jury two questions of fact as to defendant's negligence.

For appellants, *C. S. Fetterman, S. A. Johnston and Charles M. Johnston.*

Contra, Scott & Gordon.

Opinion by DEAN, J. Filed January 6, 1896.

On May 1, 1893, the Pearson Cordage Company, of Boston, shipped to plaintiffs, in Pittsburgh, by rail, a carload of binding twine and rope; on the morning of May 10th, following the shipment, the car reached destination over defendant's terminal and connecting road, this road has a large freight yard in the city, on one side of which runs Mulberry street or alley, twenty feet wide; from cars standing on tracks in this yard goods are directly delivered into wagons; this car was run on a track three feet north of Mulberry alley about nine o'clock in the evening, to be ready for unloading early the next morning. About three o'clock in the

morning a fire broke out in a large warehouse directly across the alley from where the car was standing; the fire was communicated to the car, partially destroying both it and contents. The whole would have been burned, if defendants had not, immediately after the fire broke out, run the car out of reach of the heat and sparks of the burning building, and put out the fire. The evidence showed the car door at the side was open for a space of about ten inches at the time the fire broke out, and probably through the opening the sparks from the burning building set fire to the car and lading. The facts were undisputed, that the fire originated on property other than that of defendant, and from causes over which it had no control. The bill of lading contained this condition: "No carrier, or party in possession of all or any part of the property herein described, shall be liable for any loss thereon or damage thereto, by causes beyond its control; or by floods or by fire, from any cause whatsoever occurring."

The court, on the evidence, directed the jury to find specially on these two questions:—

"1. Was defendant guilty of negligence in not exercising reasonable care, diligence and promptness in removing the car in question after the fire broke out, and by reason of which negligence the twine in the car was burned?

"2. Was defendant guilty of any negligence in leaving open the car door, whereby the twine was injured, when it would not have been damaged if the car door had been shut at the time of the fire?"

The court reserved the right to enter judgment for defendant, if the jury answered either or both questions affirmatively.

To the first question the jury answered, "No;" to the second, "Yes." The plaintiffs' damages, as to which there was no dispute, were assessed by the jury at \$1,435.80. The court was of opinion, the cause of the fire being one over which defendant had no control, and which it was not bound to anticipate, on the authority of *Railway Co. v. Trich*, 117 Pa. 390, and *Behling v. Pipe Line*, 160 Id. 359, entered judgment for defendant *non obstante veredicto*. Plaintiffs appeal, assigning for error the judgment on the point reserved.

Assuming the general rule as to common carriers to be, that they are insurers of goods against all but perils from inevitable accident, and that fire, except when caused by lightning, is not inevitable, yet here the carrier relieves himself from the stringency of the common law rule by his contract with the shipper; that is, under the legal construction of such contracts he does not insure against fire, unless by reason

of his own negligence the fire was the proximate cause of the destruction of the goods.

When the fire broke out, the degree of care rose according to the peril; the exigency then required, not only action and effort, but prompt action and extraordinary effort; under such circumstances, ordinary care would have been negligence, and such negligence, too, as might have been held to be the proximate cause of the destruction of the goods. The defendant knew, as all know, that fires frequently occur in large cities; that its yard being within the city, the freight cars therein might be endangered by such fires; it attempted to guard against the peril by employment of watchmen to notice fire and give the alarm; then had the means at hand for quick removal of the cars endangered; and although the fire broke out within twenty feet of the yard, so prompt was the action of the company, that the only destruction of property was a portion of this one car and contents; and the verdict of the jury establishes the fact that the company exercised care, diligence and promptness in removing this car as soon as possible after the fire broke out. But under the submission, the jury has gone further, and found as a fact that leaving the car door open a few inches, whereby sparks entered, was negligence, without which negligence the goods would not have been injured. It seems clear to us that on these two findings, in view of the undisputed facts, defendant is not answerable. The necessity for a quick removal of the cars from that freight yard on sudden peril from fire, was one which defendant could foresee, and thereby was bound to provide for; having done its full duty in this respect, was any other or further duty imposed upon it, so far as relates to damage from this fire?

As is held in *Morrison v. Davis & Co.*, 20 Pa. 171, common carriers "are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; and this liability includes all those consequences which may have arisen from the neglect to make provision for those damages which ordinary skill and foresight is bound to anticipate."

If, while in transit, the car door being open, sparks had entered from passing locomotives and destroyed the property, the neglect to keep the door closed, would doubtless have been the proximate cause of the damage; the originating cause would have been in control of defendant, and the omission to keep the door closed was leaving an open way for the inevitable locomotive sparks to reach the goods; the presumption under such circumstances would be, that defendant had full knowledge of the ordinary

risks incident to so conducting its business, and these facts would have brought it clearly within the rule laid down in *Hoag v. R. R. Co.*, 85 Pa. 293: "In determining what is proximate, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

But the facts here are entirely different from those supposed; the freight yard of a common carrier in a large city was a necessity to the transaction of its business as a carrier; its laden cars must stand at some point within it for the convenience of both itself and the public; the delivery from the car to the cart or wagon of the consignee was a necessity; for purpose of such delivery, it stood at this point; that a fire might break out somewhere in a large city, could be anticipated and provided against by having on hand watchmen to detect fire, and sufficient motive power to quickly move the cars to a place of safety; but that a building on a street opposite this particular car should catch fire but a few hours before the car was to be unloaded, and that in less than twenty minutes, before, by the utmost promptness and exertion, the car could be moved, sparks should pass through an aperture ten inches wide in the car and communicate fire to the goods, is now seen to have been possible, but, even after the event, so remotely possible, that certainly no jury or court can say it might or ought to have been foreseen. To say so, would be, in effect, to hold that common carriers of freight destined to large cities, must transport such freight in tightly closed fire proof cars, for that is the only precaution which could, under the circumstances here proven, have given protection against destruction by fire. We deem the fact of the open door as unimportant because, as against all that could be reasonably foreseen, or was within control of defendant, the goods were safe on an unenclosed car; the defendant had no reason to apprehend fire in that particular building, or that it would immediately be of such fierceness as to communicate itself to the car before the latter could be removed, therefore by what particular channel or means the fire immediately reached the combustible car and cargo, has no weight in determining the proximate cause.

The proximate, dominant cause of this damage was a possible fire, in a particular building near where this car stood, over which building defendant had no control and for which it was not answerable.

"But things or results which are only possi-

ble, cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference:" *Railway v. Trich, supra*.

That fires would often occur in the city, was highly probable; that the conflagration might extend and reach this freight yard, though in a less degree, was also probable; for these possibilities ample provision was made; but that a building twenty-three feet off would take fire, and within twenty minutes would set the car on fire, was only remotely possible, and therefore defendant was guilty of no negligence in not guarding against it.

As to the argument, that the question of proximate cause was for the jury, as a general proposition this is correct, but where as here there are no disputed facts, it is for the court: *Hoag v. R. R. Co., supra*; *R. R. Co. v. Kerr*, 62 Pa. 353. *The judgment is affirmed.*

STERRETT, C. J., dissented.

MUSGRAVE v. DICKSON et al.

Unless a surety pays the debt in full, he is not entitled to subrogation to any part of the rights of the creditor.

Appeal of H. A. Dickson and also Bailey & Boler, defendants, from an order of the Court of Common Pleas No. 2, of Allegheny county, in a petition by Samuel Musgrave for subrogation to the rights of H. A. Dickson under a judgment entered in the latter's favor against Bailey & Boler in a replevin case founded on a distraint for rent.

For appellants, *W. I. Craig*.

Contra, *J. M. Stoner* and *J. Charles Dicken*.

Opinion by FELL, J. Filed January 6, 1896.

This proceeding is founded upon a petition by Samuel Musgrave, one of the sureties on a replevin bond, for subrogation to the rights of the plaintiff in the judgment. An answer was filed by the appellant, the plaintiff, in which he averred that the judgment had not been fully paid, and in which he stated other supposed equitable grounds in denial of the right claimed. A separate answer was filed by the defendants, in which they alleged that they had transferred their property and business to the co-surety, J. C. Dicken, to secure him and Samuel Musgrave from any loss they might sustain by reason of the bond, and that from the management of their business an amount had been realized by Dicken more than sufficient to cover the

payment made by Musgrave. It was agreed by both sureties that the amount due the defendants from the management of the business should be credited by Musgrave on account of the money which he had paid. The issues thus raised were referred to a commissioner. The terms of the reference do not appear from the record, but it is stated in the appellee's history of the case that the commissioner was "to take testimony and find the facts in issue by the petition and answers."

The commissioner having taken and considered the testimony reported that the defendants, after the allowance of all proper credits, were indebted to the petitioner in the sum of \$872.70, and to this amount subrogation was ordered by the court. A large part of the testimony has not been brought up with the record. From an examination of what appears we see no reason to doubt the correctness of the conclusion reached either as to the obligation to account or as to the amount due. The issue raised by the answer of the plaintiff seems to have been wholly ignored. Whether any testimony was taken under this issue we are not informed. None appears with the record. Its omission would be ground for the affirmance of the order if there was a finding and report by the commissioner. Neither has been made. In the whole proceeding as it is presented no reference is made to this issue from the time it is raised by petition and answer until it is finally disposed of by the order making absolute the rule to show cause why subrogation should not be allowed. Its importance may have been an afterthought, but the issue is one which cannot now be disregarded. It is distinctly raised, and is the subject of an exception to the report of the commissioner and of a specification of error.

Subrogation rests upon purely equitable grounds, and it will not be enforced against superior equities. Unless the surety pays the debt in full he is not entitled to subrogation, and until this is done the creditor will be left in full possession and control of the debt and the remedies for its enforcement: *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 120; *Kyner v. Kyner*, 6 Watts, 221; *Bank v. Potius*, 10 Id. 148; *Hoover v. Epler*, 52 Pa. 522; *Allegheny National Bank's Appeal*, 34 PITTSBURGH LEGAL JOURNAL, 263. The settlement of the account between the sureties and the defendant fixed the amount of the liability of the latter and the extent of the right to indemnity, but it did not affect the right of subrogation, which will never be allowed to the prejudice and injury of the creditor.

The judgment is reversed and the record is

remitted to the Court of Common Pleas in order that there may be a finding upon the issue raised by the answer of the appellant.

GALEY v. MELLON.

A contract for drilling an oil well may be assigned by the contractor when the work necessarily requires the labor and attention of a number of men, and it does not appear that, because of his knowledge, experience, or pecuniary ability or for any other reason, the contractor was especially fitted to carry on the work.

Appeal of W. L. Mellon, defendant, from the judgment of the Court of Common Pleas of Washington county, in an action of *assumpsit* brought by Samuel Galey, for the use of A. G. and J. H. Smith, copartners as Smith Bros., to recover on a contract for drilling an oil well.

At the trial before MCILVAINE, P. J., it appeared that on April 1, 1893, W. L. Mellon of Pittsburgh contracted in writing with Samuel Galey to drill a well for oil or gas on a farm in Washington county. By the terms of the contract Galey was to furnish all tools, cables, etc., at his own expense and risk, and the fuel, labor and hauling required in completing the well, and case it dry of water. Mellon was to furnish wood, rig, casing, machinery and water, and pay 90 cents per foot for the drilling. On the same day the contract was made, Galey, in consideration of \$180 made a parol assignment thereof to Smith Bros., the appellees, and Smith Bros., who were experienced contractors and drillers, did the work under the contract. Smith Bros. were not sub-contractors. Defendant claimed that one of the wells drilled was defective, owing to the neglect or incapacity of Smith Bros.' superintendent, and that Galey had no right to assign the contract to Smith Bros.

For appellant, *John W. Donnan* and *J. McF. Carpenter*.

Contra, *J. M. Braden*, *Albert S. Sprowls* and *John B. Chapman*.

Opinion by FELL, J. Filed January 6, 1896.

This action is founded upon a contract for drilling an oil well. The personal performance of the work by the legal plaintiff could not have been contemplated by the parties at the time the contract was made. The work of necessity required the labor and attention of a number of men, and it does not appear that because of his knowledge, experience or pecuniary ability, or for any other reason, Galey was especially fitted to carry it on. There is nothing of a personal nature about it, and its personal performance by him was not the inducement nor of the essence of the contract. The contract was assigned to Smith Bros., the use plaintiffs, and

the work under it was done by them with the knowledge of the defendants from the beginning. The jury found that they were not sub-contractors suing upon a contract as to which they had no rights. It was competent for Galey to assign to them the executory contract with all of his rights under it, or after the completion of the work to assign the right to receive the amount due on settlement. In either event they had the right to use his name as legal plaintiff, but in neither would their rights rise higher than his. The action was tried on the right of the legal plaintiff to recover, the doors were opened to every defense available against him, and in no aspect of the case was the defendant prejudiced because of the form of the action.

Practically the question at the trial was whether the legal plaintiff was entitled to recover on the contract, and that depended upon whether the fault which ultimately resulted in the destruction of one of the wells was chargeable to the defendant's field superintendent. The jury found that it was, and they had the aid of a charge by the learned trial judge which fully and clearly explains the facts and the law applicable to them.

The judgment is affirmed.

Superior Court, Penn'a.

RUFFNER v. HOOKS.

To maintain an action for malicious prosecution, it must appear that the prosecution was instituted without probable cause, and that the defendant was actuated by malice, and where one of these requisites is missing the action will not stand.

Ordinarily, the discharge or acquittal of the plaintiff in a criminal prosecution casts the burden of proof on the defendant to show that there was probable cause; but this rule has no application where the plaintiff's own testimony shows its existence.

Homicide is peresumably unlawful and its commission affords probable cause for a prosecutor.

Appeal of Hugh A. Hooks, defendant, from the judgment of the Court of Common Pleas of Armstrong county, in an action for trespass, in which John B. Ruffner was plaintiff.

This was an action to recover damages for an alleged malicious prosecution.

The facts appearing on the trial before RAYBURN, P. J., are stated fully in the opinion of the Superior Court, *infra*. Verdict and judgment for plaintiff for \$200. The defendant took this appeal.

For appellant, *W. L. Peart* and *M. F. Leason*.
Contra, *W. D. Patton* and *Floy C. Jones*.

Opinion by SMITH, J. Filed July 16, 1896.

This action of trespass was brought to recover

damages from the defendant on the ground that he instigated a malicious prosecution against the plaintiff.

In order to maintain the action it must appear that the prosecution was instituted without probable cause and that the defendant was actuated by malice. These are essential and must co-exist. Probable cause is defined to be: "A reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense." *STERRETT, C. J.*, 151 Pa. 90. Other definitions are given in the books, and though differently worded are substantially the same as the above. The essential element is a reasonable ground for belief of guilt.

"Malice" has been defined to be: "The doing a wrongful act intentionally, without just cause or excuse." 14 Am. & Eng. Ency. of Law, 5. And considered as an element in a malicious prosecution it is said: "By the term 'malice' is meant any indirect motive of wrong. It may be any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice: 14 Am. & Eng. Ency. of Law, 22. It is the evil intention with which an act is done.

That the motive of the defendant in this case in procuring the prosecution of the plaintiff, was purely malicious can hardly be gainsaid; that he was at all prompted with a desire to vindicate the law or promote the public welfare, was not pretended; and if the decision of the case depended upon the question of malice simply, there would be no hesitation about its disposition.

The facts of the case, as disclosed by the testimony, are remarkable concerning both the plaintiff and the defendant. On Sunday, September 23, 1866, a young man named Shields A. Rosensteel, about seventeen years of age, went upon the premises of Christopher Ruffner, father of the plaintiff, and was taken chestnuts from a tree near the Ruffner dwelling, whereupon the plaintiff, then a lad of twelve or thirteen years, remonstrated with Rosensteel, and forbade him taking the chestnuts; a dispute followed, and stones were thrown, one of which struck Rosensteel on the neck and felled him to the ground, where he died within a few minutes. The next day, William M. Rosensteel, father of the deceased, went to Ruffner's, and after talking the matter over with the plaintiff's father, concluded he would not begin a criminal prosecution, and took his boy's remains away. There the matter was allowed to rest until October 31, 1891, over twenty-five years, when William M. Rosensteel made information against the plaintiff, charging him with the murder of Shields A.

Rosensteel, upon which the plaintiff was held for trial under bail until December 9, 1891, when the indictment against him was ignored by the grand jury, and on the 18th of February following, the present action for malicious prosecution was commenced. It also appears from the evidence that on May 5, 1890, the plaintiff was appointed guardian of A. M. Meyers and A. G. Meyers, minor children of William Meyers, deceased; and the defendant, having taken stone from the land of these children, the plaintiff, in his capacity as guardian, brought suit against him and recovered their value; and because of this, the defendant afterwards induced William M. Rosensteel to begin the prosecution for murder. Under the evidence the controlling question is whether there was probable cause for the prosecution; the court left that to the jury, and they found a verdict for the plaintiff.

On the trial, the plaintiff was sworn in his own behalf, and testified as follows concerning the death of Rosensteel:

"Q. State to the jury as far as you recollect, what the circumstances of that trouble was. A. Yes, I can. Why, we was—a lot of us boys was together, and there was some boys there taking chestnuts; we told them to leave the chestnuts by the house there and go to the lower tree, and they came down off the trees and commenced to pound us with stones at one another, so we commenced to throw back; somehow or another, Shields Rosensteel was killed there, whether I did it or not I cannot tell; I did not see the stone strike him."

On cross-examination, he testified as follows:

"Now, how many stones did you throw there that afternoon? A. I don't remember how many I did. Q. Don't you know you hit him with one? A. No, sir, I don't know it. Q. Do you say you did not hit him? A. No sir, I don't say so; I say I don't know. Q. Was there anybody else threw stones, but you? A. Oh, Yes. Q. Who was that? A. These other boys. Q. You say they were all throwing stones? A. Yes, sir. Q. Did you deny killing him at that time? A. No, sir, I think not; I did not know it any more than I do to-day; I said so then and I do now, that I don't know whether I did or did not kill him. Q. How many stones did you throw that day? A. I tell you I don't remember. Q. After you threw the last stone, what occurred? A. I don't know whether I threw the last one that was thrown or not. Q. I am speaking of the last time you threw. Did not Rosensteel drop right down when you throwed the last stone you threw? A. No, sir, think not. Q. What did you do then? A. He was killed there; I think he was standing yet.

Q. How long did he stand afterwards? A. I think quite a while. Q. How long? A. I don't remember how long. Q. Then you don't know whether he stood up at all or not, after you threw the last stone? A. Not just exactly; I can't say whether he did or not. Q. Did any one else throw a stone after you threw the last one? A. I don't know whether they did or not. Q. Now, Mr. Ruffner, what was Rosensteel's position; how was he standing when you hit him? A. Oh, I don't remember. Q. Whereabouts was he struck with the stone? A. Well, I did not see where the stone struck him; no, I would not go to see; I walked up shortly afterwards, up to where he was. Q. Looked at him? A. Yes, sir. Q. What was his condition? A. He was lying there on the ground. Q. How long after he was struck until you walked up to see him? A. I don't know. It might have been two or three minutes. Q. Where did the other boys go to? A. They run away. Q. They run as soon as the stones began to fly? A. Oh, yes. Q. How long did the stoning match continue? A. Well, not very long; four or five minutes. Q. Did anybody throw a stone at you? A. Oh, yes. Q. Who? A. I don't remember. Q. Did Rosensteel? A. I don't remember whether he did or not, but I think he did."

Witnesses were called on the part of the defendant, one of whom said he was present and saw the plaintiff throw the stone at Rosensteel which hit and killed him, and that Rosensteel did not throw any stones at all. Other witnesses testified to alleged declarations of the plaintiff admitting that he killed Rosensteel. From all the testimony, the fact that the plaintiff caused the death of Rosensteel might fairly be found, and a conviction therefor sustained. It is not necessary, however, for us to pass upon that in this case. Our inquiry is whether probable cause for the prosecution was disproved by the plaintiff. The defendant's belief of the plaintiff's guilt is not denied, and upon an examination of the evidence we find nothing which would justify its denial. According to the testimony, he was told by the father of Rosensteel before the prosecution was begun that the plaintiff killed young Rosensteel, and the defendant was evidently acquitted with the facts bearing most strongly against the plaintiff, before the latter's arrest. There is neither evidence nor pretense that the defendant sought to coerce the plaintiff into paying money, or to yield any right or privilege, through the prosecution; his sole motive was one of revenge, and, therefore, the cases holding that where prosecutions have been commenced for the purpose of gain, the plaintiff in an action for damages

therefor, need not prove malice or want of probable cause, do not apply here.

The discharge or acquittal of the plaintiff, ordinarily casts the burden of proof on the defendant to show that there was probable cause. But it is well settled that this rule has no application in cases where the plaintiff's own testimony shows its existence. Unfortunately for the plaintiff, in this case his own testimony not only shows probable but actual cause for a prosecution against him. He admits that young Rosensteel was killed by being struck with a stone, that he threw stones at Rosensteel, one of which may have struck and killed him; and viewing his testimony as a whole, it cannot be said as matter of law, that the killing was justifiable, or excusable. By his own testimony he may have been guilty of manslaughter, and if the testimony of the other witnesses be true, may have been murder. Under this state of facts the law will require no person to pay damages for instituting a prosecution, no matter how malicious the motive prompting it. "If this were not so, the evil spirit of the prosecution might redeem the evil act of the criminal," and grave crimes often go unpunished. It has been repeatedly decided that if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable: *Dietz v. Langfitt*, 63 Pa. 234; *McCarthy v. DeArmit*, 99 Id. 63; *Gillisford v. Windel*, 108 Id. 142; *Emerson v. Cochran*, 111 Id. 619; *McClafferty v. Philp*, 151 Id. 86. Furthermore, it has been said by our Supreme Court that all homicides are presumably unlawful and, therefore, the fact that one has been committed is of itself probable cause for proceeding against the perpetrator, to ascertain whether there was guilt in it or not: 63 Pa. 239. And where the plaintiff's own testimony shows probable cause it is the duty of the court to dispose of the case: *Berner v. Dunlap*, 94 Pa. 329; *McCarthy v. DeArmit*, 99 Id. 63; *Sutton v. Anderson*, 103 Id. 151; *Emerson v. Cochran*, 111 Id. 619; *Sloan v. Schomaker*, 136 Id. 382; *Cooper v. Hart & Co.*, 147 Id. 594; *Nachtman v. Hammer*, 155 Id. 200; *Steimling v. Bower*, 156 Id. 408; *Mitchell v. Logan*, 172 Id. 349.

However reprehensible the motive of the defendant may have been in this case, the plaintiff's regrettable connection with the transaction that caused the death of Shields A. Rosensteel, and the defendant's knowledge of it before instituting the prosecution, bars a recovery against him.

As these views are decisive of the case on its merits, it is unnecessary to consider the assignments of error specifically.

The judgment is reversed.

[See 43 PITTSBURGH LEGAL JOURNAL, 160.]

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PITTSBURGH, PA., OCTOBER 7, 1896.

Supreme Court, Penn'a.

N. GREEN & CO., Limited, v. THOMPSON et al.

Where the plaintiff in a mechanic's lien case has complied with all the provisions of the statute relating to the lien, it is presumed that the materials were furnished or the work was done on the credit of the buildings.

Evidence that the lumber charged in the bill of particulars did not go into any of the buildings mentioned in the claim is admissible to rebut this presumption.

Evidence that the lumber was charged by plaintiff to the contractor is also admissible for this purpose.

Appeal of John Thompson, James M. Nevin, owners or reputed owners, and John A. Wood, contractor, defendants, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, upon a *scire facias sur* mechanic's lien brought by N. Green & Co., Limited, to enforce a lien for materials.

At the trial before STOWE, P. J., it appeared that the lien was filed against five houses for material furnished. The agreement without date known as Exhibit "B," under which the buildings were built, was as follows:

John A. Wood agrees to build for Thompson and Nevin five (5) houses on lots 21, 22, 23 and 24 Dickson Plan, 13th ward, Pittsburgh, exactly like twelve houses built for Jas. L. DeLong on south side of Ann street, Reynoldton, by said Wood under agreement dated June 4, 1892, except the cellars are to extend out under porches, and wall to be of terracotta instead of stone, for sum of four thousand dollars (\$4,000), payments to be made same as DeLong houses, except first payment is to be \$250 more, second payment \$250 less, third payment \$250 more, and fourth payment \$250 less, otherwise same as DeLong's payments.

[Signed]

JOHN A. WOOD,
THOMPSON & NEVIN,
per NEVIN.

Another agreement dated February 13, 1893, between John A. Wood and James A. Nevin provided for the erection of another block of five houses on lots 33, 34, 35, 36 and 37 in Dickson's plan. The latter agreement contained a stipulation that the buildings "shall be finished and turned over by the contractor to the owner, on completion, free and clear of all liens and encumbrance for work done or material furnished by any person or persons whatsoever on and for said building."

There was no evidence to show that the stipulation against liens contained in contract A had been extended to contract B.

The defendant submitted, *inter alia*, these points, which with their answers were as follows:

2. The court excluded the contract between Wood and Nevin known as contract A. (Second assignment of error.)

3. The court sustained the objection to the following question asked of J. M. Nevin: What, if any, settlement have you made with the contractor in this case. *Answer*.—Objection sustained and bill sealed for the defendants. (Third assignment of error.)

4. The court sustained the objection to the following question asked of John A. Wood: Into what houses did this lumber and material go. *Answer*.—Objection sustained and bill sealed for the defendants. (Fourth assignment of error.)

5. The court sustained the objection to the following question asked of John A. Wood: When was the first intimation that you got that there would be mechanics' liens filed in this case. *Answer*.—Objection sustained and bill sealed for the defendants. (Fifth assignment of error.)

6. The court sustained the objection to the following question asked of John A. Wood: Are what are known as the Cobb alley houses included in this lien. *Answer*.—Objection sustained and bill sealed for the defendants. (Sixth assignment of error.)

7. The court gave the jury binding instructions for the plaintiff. (Seventh assignment of error.)

Verdict and judgment for plaintiff for \$213.63; whereupon defendants appealed.

For appellants, *H. L. Castle* and *James M. Nevin*.

Contra, *John S. Lambie* and *A. M. Brown*.

Opinion by MCCOLLUM, J. Filed January 6, 1896.

The buildings against which the claim in suit was filed were "constructed under the contract designated as exhibit B," and there is nothing in it to suggest that it is subject to or in any manner qualified by the contract of February 13, designated as exhibit "A," nor is there anything in the latter from which it can be inferred that any provision of it is applicable to the former. The defendants have not printed in their paper-book any evidence which tends to show that there was a parol agreement modifying the contract under which the buildings liened were erected, nor is there an intimation

in their printed argument that such an agreement was made. It is useless to inquire whether contract "A" contains a stipulation against liens, until it is shown that its provisions extend to, and govern the construction of contract "B." We cannot say therefore that the court erred in the ruling complained of in the second specification, and as the defendants admit that the third specification must stand or fall with the second, the third need not be discussed or considered.

Under section 1 of rule 8 of the Courts of Common Pleas of Allegheny, the defendants were bound to file their answer to the plaintiff's claim and such items of the claim and material averments of fact as were not directly and specifically denied by them must be taken as admitted. An examination of the claim and the answer shows that the only averment of fact in the former which is denied in the latter is that the lumber was furnished on the faith and credit of the buildings referred to therein. Where the plaintiff in a mechanic's lien case has complied with all the provisions of the statute relating to the lien he claims, it is presumed that the materials were furnished, or the work was done, on the credit of the buildings: *Hommel v. Lewis*, 104 Pa. 465, and *Noar v. Gill*, 111 Pa. 488. This is a rebuttable presumption, but it casts on the defendants the burden of showing that it is not in accordance with the fact. In this case, therefore, in the only issue of fact made by the claim and answer, the burden was on the defendants, and in the discharge of that burden they should have been allowed to show any fact or circumstance tending to negative the presumption. That the lumber charged in the bill of particulars did not go into any buildings mentioned in the claim was such a fact or circumstance, and the defendants should have been permitted to prove it if they were able to do so. As we understand their contention the purpose of the question to which their fourth specification relates was to show that the lumber charged as above stated was not used in the construction of the buildings included in the claim. We think therefore that the court erred in rejecting the question.

The statement of the account under date of September 27, 1893, and designated in defendants' paper-book as exhibit "2" shows that the lumber was charged by the plaintiff to the contractor. This was a circumstance affording some support to the defendants' claim that the lumber was not sold on the credit of the buildings: *Hommel v. Lewis*, *supra*. That the lumber was not used in the buildings, and that

it was charged to the contractor were matters proper to be shown to and considered by the jury on the issue of fact made by the claim and answer.

We do not discover any error in the rulings complained of in the fifth and sixth specifications, and it does not appear in the first that there was any exception taken, bill sealed, or objection made to the admission of the papers mentioned in it. In accordance with the foregoing view we sustain the fourth and seventh specifications and overrule the first, second, third, fifth and sixth.

Judgment reversed and a venire facias de novo awarded.

HUCKESTEIN & CO. v. J. KAUFMAN & BROS.

Appeal of JOHN FRAZIER.

Where the parties, by agreement in writing, submit their "differences" to arbitrators mutually chosen, whose award shall be "final and conclusive," the courts, in the absence of fraud or misbehavior on part of the arbitrators, will not inquire whether the award was warranted by the evidence submitted.

Though a particular item was not in dispute, and was therefore not within the terms of the submission, if it was presented to the arbitrators, and it was considered in making up their award, the party who presented it is estopped from denying their jurisdiction to consider it.

The finding by an auditor, as a fact, that an undisputed item was submitted by a complaining party to the arbitrators, and was passed on by them, will not be disturbed, unless for manifest error.

Appeal of John Frazier, trading as Frazier Bros., from the decree of the Court of Common Pleas No. 3, of Allegheny county, in an action brought by John Huckestein, doing business as Huckestein & Co., against Jacob Kaufman, Isaac Kaufman, Morris Kaufman and Henry Kaufman, doing business as Kaufman Bros., and J. Kaufman Bros.

From a decree confirming the auditor's report distributing the amount of the verdict, which was paid into court, John Frazier appeals.

The facts sufficiently appear in the opinion of the Supreme Court, *infra*.

For appellant, *James Bredin* and *Thomas Patterson*.

Contra, *W. B. Rodgers* and *J. H. Beal*.

Opinion by DEAN, J. Filed January 6, 1896.

The defendants, Kaufman & Bros., contracted with John Huckestein, a builder doing business as Huckestein & Company, for the erection of a building on Fifth avenue in the city of Pittsburgh, for the price of \$15,000, to be increased by any changes or additions subsequent to the contract, or during the progress of

the work. This price, by subsequent additions, was largely increased. The first contract between the parties was made the 15th of June, 1892, and this, owing to important changes in design and height of building, was followed by three others within sixty days thereafter, whereby the design of the building was greatly changed; before any of the subsequent contracts with Kaufman & Brothers were reduced to writing, Huckestein on 29th of June, 1892, sub-contracted the carpenter work to John Frazier, doing business as Frazier Brothers. By this contract, Frazier agreed to do all the carpenter work and furnish all the materials therefor, according to specifications, for the price of \$15,000, subject to increase or diminution by change of plans and material; the price was largely increased by subsequent additions. All of the work and material to be subject to the approval of the supervising architect of Kaufman & Brothers. Payments were to be made Frazier as the work progressed, according to the estimate of value by the architect, as follows: When the second floor joists are in place, two-thirds of the value of the work up to that point; a like two-thirds when third floor joists are in place; and so on, making six distinct payments when the plastering was finished; then the seventh and final payment was to be made when all the work was completed to the satisfaction of the architect; this payment, it was stipulated, might be made by an order drawn by Huckestein in favor of Frazier on Kaufman & Brothers. This last payment was not to be made until the architect certified that the work and material were approved and accepted by him. The building was completed February 13, 1893, and Kaufman & Brothers took possession. In the meantime, a number of payments had been made to Frazier by Huckestein, but the seventh and last had not been made, nor had the amount of it been determined.

The contract of Huckestein embodied a stipulation that before final payment to him by Kaufman & Brothers, the building was to be delivered free from all liens. There was also a provision for arbitration, if any dispute arose between owner and contractor concerning the value of any changes or additions to the original contract, and the decision of the arbitrators was to be final and binding on each of the parties. Kaufman refused to make final settlement and payment to Huckestein, until he procured from Frazier a release of right to file a mechanic's lien. This obstacle to a settlement with Kaufman, brought Huckestein and Frazier into negotiations as to balance due Frazier. On the 2d of June, 1893, they met at the office of T. Baird

Patterson, Esq., counsel for Frazier, who drew up an agreement, which was there signed by them. In this it was agreed that in consideration of an order for \$6,750, given to Frazier by Huckestein on Kaufmans and release by Frazier of right of lien, Huckestein would at once proceed to obtain payment from Kaufman of the full amount yet due over and above the order on his contract as principal contractor; and in case the order was not paid by Kaufmans, would protect Frazier's claim, and press arbitration against them for the full amount payable under the contract, and on the determination of this suit, then all differences between Huckestein and Frazier should be submitted to arbitration, as provided in the written contract between Huckestein and Frazier, such award to be final. In a subsequent agreement, July 27, 1893, it was further agreed that Frazier should have the right to present and prove before the Huckestein-Kaufman arbitration, a bill of \$4,971.98, for extra work on the building, for which Huckestein denied liability, but as the architect claimed this bill should be presented through the principal contractor, Huckestein consented it might be so presented, without any acknowledgment of liability therefor on his part.

Huckestein filed a lien against Kaufman for the sum claimed by him as principal contractor, including the work and material of Frazier, the sub-contractor. As both parties seem to have anticipated, Kaufman refused payment of the \$6,750 order given to Frazier. Huckestein therefore assigned to Frazier that amount of his lien as a protection of his claim, until the final determination of the Kaufman arbitration. Notwithstanding his agreement with Huckestein, in consideration of the \$6,750 order to file no no liens, acting under the advice of counsel, Frazier, on the 19th of September, filed liens against the buildings, showing a balance due him of \$16,630.84. Thereafter, Huckestein gave notice to Kaufman that he had revoked the \$6,750 order given to Frazier and also notified Frazier that he revoked both order and assignment to him of \$6,750 of lien. Huckestein without proceeding to judgment on his lien, brought an action of *assumpsit* against Kaufman, and recovered a judgment of \$28,000. In the meantime, however, under the arbitration clause in the contract between Huckestein and Frazier, the latter had demanded an arbitration and on September 8, 1893, they entered into a written agreement, reciting that differences had arisen between them as to the amount due Frazier "for work done and materials furnished in doing the carpenter work in the erection and construction, additions, alterations and improve-

ments, of the Kaufman buildings * * * Now, for the purpose of adjusting said differences, it is hereby agreed to refer the same to three arbitrators," as provided in the building contracts. Thereupon Frazier chose John Trimble, and Huckestein, Charles Simon, and the parties further agreed upon John W. Pryor as the third arbitrator, and that the arbitrators thus selected should proceed to ascertain the amount due Frazier "for the work done and materials furnished in and about said Kaufman buildings, taking into consideration the work omitted and changes made, and the award so made shall be final and conclusive upon all parties of all accounts arising out of the work done and materials furnished in and about said building." On the 11th of September, three days afterwards, the arbitrators met, and at that and many subsequent meetings heard the parties and their proofs, and made this award: We "do now find under the submission to us, there is due from Huckestein & Company to Frazier Brothers, the sum of \$3,539.58, and we award that sum." And thus matters stood when Huckestein obtained his judgment in *assumpsit* against Kaufman for \$23,000. Kaufman then paid the amount of the judgment into court for distribution to those entitled. As Huckestein had made assignments of different amounts of his lien to a number of creditors beside Frazier, by agreement of counsel, and decree of the court, the distribution and all questions arising out of the same were referred to Thomas Herriott, Esq., who after full hearing, passed on all the questions of fact and law, and made report to the court; in this he found the amount payable to Frazier to be \$3,539.80, the amount awarded by the arbitrators. Frazier filed exceptions, which the court overruled, and confirmed the report absolutely. From this decree Frazier appeals to this court.

In arriving at the amount due Frazier, the auditor found that his full claim had been submitted to the arbitrators, and that under the terms of the submission he was concluded by their award. Frazier contended, in substance, the order for \$6,750 on Kaufman, was intended as a payment, was not in dispute and was not submitted to the arbitrators, but their award of \$3,539.80 was for extra work not included in the order; and although appellant prefers eight assignments of error, they are all ruled by a decision on this one contention.

The appellant argues, that as at the arbitration the order for \$6,750 was not a matter in dispute between the parties, therefore it was not within the terms of the written submission.

There is no doubt that where parties have

submitted disputes or differences to arbitrament and award, either party may show that a particular transaction was not in dispute, and was not submitted. Here, the written submission states, "differences have arisen," and for the purpose of adjusting said "differences" they are referred to the three arbitrators. The claim of Frazier on Huckestein was for payment of the amount unpaid him on his sub-contract, including the \$6,750 covered by the order. If Kaufmans had secured payment of this to Frazier, or he had accepted them as his debtors, it might have appeared that this sum was no longer at variance between them. But Kaufmans refused to honor the order, leaving the original relation of debtor and creditor between Huckestein and Frazier unaffected; the debt was still owing and unpaid by Huckestein to Frazier at the date of the arbitration, and was entirely within the control of Frazier. If, then, having the power so to do, he laid the items embraced in this order before the arbitrators, to be passed upon by them in the adjustment of the balance due him from Huckestein, and they did consider and pass upon them, he is estopped from now setting it up as a debt outside of and in addition to the award. Whether in "difference" between them or not, he made it a matter in difference by submitting it.

As to the fact, this is the finding of the learned auditor in the court below:

"It is clear that Frazier Brothers, in presenting their claim, presented their whole claim. It is also clear from the bill which Huckestein & Company presented to the arbitrators, showing what they admit to be due to Frazier Brothers, that they do not admit the items which Frazier Brothers claim went to make up the order of \$6,750. It is a significant fact also, that if the order for \$6,750 was not submitted to the arbitrators and they were not to pass upon it, this fact is not mentioned in their report, as the only amount which is admitted by all parties to be undisputed and due to Frazier Brothers, viz., the amount of \$1,728, is included in the sum awarded by the arbitrators to Frazier Brothers, and a note is added at the bottom of the award to call special attention to this fact.

"The auditor therefore thinks that from the papers in the case and the papers admitted to have been before the arbitrators, he is compelled to find that the arbitrators did consider the amount due to Frazier Brothers for all claims of every kind for work done by them upon the Kaufman buildings. In so ruling, he feels that an admitted claim for \$6,750 is reduced to \$3,539.58 and he is satisfied that the claim should not have been so reduced. However, as

the parties have seen fit to select their own court for the trial of matters in dispute between them, he does not see how it is possible at this time to interfere with the judgment of that court.

The whole argument of appellant is directed to demonstrating that the arbitrators made a mistake in their award; it is in effect urged that instead of awarding Frazier \$3,539.58, they should have added to that sum the amount of the order, \$8,750. But as the auditor correctly says, the courts cannot review the award of the court constituted by the parties themselves, and whose determination they stipulated should be final. No fraud or misbehavior is alleged; the only question before the auditor was the one on which he passed, viz., did Frazier submit, as part of his claim to arbitration, the items embraced in the order? He finds that they were submitted, and this finding is based on ample evidence. There was testimony that the sole consideration for the order was the agreement that Frazier should not enter a lien; in violation of his agreement, he did file liens, although Huckestein had assigned to him of his lien, for his (Frazier's) protection, an amount of his (Huckestein's) lien equal to the face of the order. When notified that in thus acting he was violating his agreement, he replied, he intended to protect himself for his whole claim. When he demanded an arbitration, accompanying the demand was a bill of items including his whole claim, and in it the very items covered by the order. Huckestein, Boyd and the arbitrators testify the items embraced by the order were submitted by Frazier and passed on in making up the award. The testimony of Frazier that the order was not submitted and formed no part of the award is vague and unsatisfactory; the testimony of his counsel, Mr. Patterson, on the same point is direct and positive; but it is flatly contradicted by Huckestein and Boyd and the two arbitrators; besides, the testimony of the latter is corroborated by Frazier's own itemized claim. Not only was there evidence to warrant the finding of fact by the auditor, but any other finding would have been against the decided weight of the evidence. This finding of fact in the absence of manifest error is conclusive.

The assignments of error, in view of the very full and clear report of the auditor, hardly demanded the thorough examination we have given them; but appellant's counsel pressed so earnestly upon us the allegation that his client had been wronged to the extent of \$8,750, that we have been moved to a careful review of the whole case with the voluminous testimony appended. We are satisfied appellant suffered no wrong, either by the decision of the auditor or

the approval of his report by the court below. If any wrong was done him, it was by a court of his own selection, and, in part, of his own creation; to that court, the arbitrators, he submitted his whole claim; if they erred in passing on the merits of it, the error is beyond our reach, for he formally stipulated in writing their decision should be final.

All the assignments of error are overruled, the decree of the court below approving the auditor's report is affirmed, and appeal dismissed at costs of appellant.

WHITE et al. v. ROSENTHAL.

The statement by an intelligent purchaser of goods that his financial condition was at least as good as that shown by a statement made the previous year, is fraudulent if in fact his indebtedness arising from purchases of goods is ten times as great as it was the previous year, though he has the goods so purchased as part of his assets.

On an issue as to whether goods were purchased under fraudulent representations as to the purchaser's pecuniary standing, evidence of purchases subsequently made was admissible, in connection with evidence of previous purchases, to show a general scheme on his part to obtain large quantities of goods, and then profit by his insolvency.

Appeal of David Rosenthal, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of trespass for deceit brought by James F. White & Co.

For appellant, *J. T. Buchanan and J. S. & E. G. Ferguson.*

Contra, A. Blakeley, A. M. Blakeley and W. A. Blakeley.

Opinion by DEAN, J. Filed January 6, 1896.

The plaintiff's action was for deceit. The statement avers that plaintiffs were wholesale dealers in dry goods in New York city and defendant was a retail dealer in same goods in Pittsburgh; that on 9th of August, 1892, defendant called upon plaintiffs to make a purchase of goods on credit, and represented that he had taken inventory the previous year of his assets and liabilities and his financial condition was as follows:

Stock on hand in his Pittsburgh store,	\$18,675.00
Cash on hand,	2,350.00
Good book accounts,	12,350.75
Unincumbered real estate,	4,360.00

Total assets,	\$37,735.75
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That he was indebted on open account, bills payable and borrowed money in the amount of \$7,525. He further stated, there were no judgment notes against him, and that he was not liable as surety, guarantor or accommodation

drawer, and that he knew of no claim that would affect his financial standing. That on the faith of these representations defendant obtained from plaintiffs \$1,000 worth of goods on credit; that said representations were false and known to be so by defendant and were made with the intent to cheat and defraud plaintiffs of their goods, in which he was successful, and plaintiffs claimed damages in the amount of \$1,000.

This statement clearly avers a good cause of action. The evidence to sustain and in denial of it was very contradictory; the material point in dispute being, whether defendant had made the false statement on 9th of August, 1892, when this particular bill was purchased. Prior to September, 1891, defendant had made a written statement to plaintiffs in exact accord with that set out in the declaration of claim. Bryce Gray, a partner in the plaintiff firm, testifies that on the 9th of August, 1892, when the last purchase was made, he called defendant into his private room, where in answer to his questions he positively stated his financial condition was if anything better than the year before, when he made the written statement. Rosenthal, the defendant, positively denies this, and asserts Gray asked him nothing about his financial condition at that time and he made no statement concerning it. The written statement seems to have been substantially correct as of the time it was made, but afterwards defendant greatly enlarged his business with no increase of capital, so that his purchases of goods were principally on credit; he admits that they amounted to about \$85,000, all on credit, at this last visit to New York. His own evidence shows that his financial condition had greatly changed in the year between the written statement and the last purchase. Assume as argued that his actual indebtedness had not greatly increased before his last visit to New York, nevertheless, he went there with the avowed purpose of purchasing \$60,000 worth of goods on a credit from thirty to ninety days, and on the very day of the interview with Gray had bought a large portion of this amount; his actual indebtedness was then not less than \$30,000, which he intended should be \$60,000 before he left, and his intention was carried out. If he under such circumstances represented to Gray his financial condition was, if anything, better than the year before, it was a gross falsehood, for instead of owing \$7,500, he owed, or as he knew in a day or two would owe, ten times that amount; true, his assets would be increased by the value of the stock on hand, but this value was wholly problematical, depending on success in the venture of largely,

increased business with no corresponding increase of capital.

In view of the evidence and its contradictory character, the court fully and fairly submitted it to the jury to inquire, 1. Was a representation made to induce the credit? 2. Was it knowingly false? 3. Did plaintiffs rely on it? On the answers to these interrogatories turned the verdict; the jury found for plaintiff on each. They may have erred, but clearly the court did not.

The assignment of error to the admission of evidence of debts created by purchases of goods after the 9th of August would be well made, considered apart from its connection with other evidence tending to establish the deceit. The plaintiffs had shown purchases made on credit in June and July, these followed by showing continued purchases down to September aggregating nearly \$90,000 on credit, then insolvency resulting in a sale of the entire stock for less than \$20,000, and the store eventually put in name of defendant's wife. Plaintiffs claimed that all of the transactions taken together indicated a scheme conceived by defendant to obtain large quantities of goods on credit from plaintiffs and others by false representations, and then in an indirect way profit by a bankruptcy. In this view the evidence was admissible, not as tending to establish that indebtedness was created by the subsequent purchases, but that these purchases constituted part of one scheme to defraud, conceived by him before he practiced it on plaintiffs to their injury.

We see nothing in the assignments of error which calls for further notice and the judgment is accordingly affirmed.

Superior Court, Penn'a.

PITTSBURGH GLASS CO. v. ELECTRICAL SUPPLY AND CONSTRUCTION CO.

When goods are sold, but the vendee permits them to remain in the custody of the vendor after the time mutually agreed for their delivery, and they are accidentally destroyed, the vendee is liable to the vendor for their value as contracted for.

The setting aside of goods taken out of a large quantity by the vendee constitutes a delivery.

Appeal of H. M. Doubleday, Walter S. Childs, Walter H. Stone and William D. Card, partners, doing business under the name of the Electrical Supply and Construction Company, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit*, wherein the Pittsburgh Glass Company was

plaintiff, and the appellants, together with the North American Construction Company, against which the suit was discontinued before the trial, were defendants.

The facts of the case are fully set forth in the opinion of the Superior Court, *infra*.

On the trial, the court (MAGEE, J.) charged the jury, *inter alia*, as follows: "I say, under the agreement that they have given here, I see no reason why judgment should not be rendered against the defendant's for the amount of the order."

Verdict for plaintiff and judgment thereon.

The defendant took this appeal, and assigned as error, *inter alia*, the part of the charge above quoted.

For appellant, *William M. Galbraith*.
Contra, *Willis F. McCook*.

Opinion by BEAVER, J. Filed July 16, 1896.

Prior to April 15, 1892, the North American Construction Company, a corporation of Pennsylvania, was engaged in the manufacture and sale of electrical supplies in the city of Pittsburgh. It also undertook contracts for electrical construction in the said city and within a territory embraced within a radius of one hundred miles therefrom. The latter business for some reason (stated to be for convenience) was conducted in the name of the Electrical Supply and Construction Company. On the date above mentioned the corporation, by an agreement in writing, sold to the appellants all that certain branch of their business conducted under the name and style of the Electrical Supply and Construction Company, including all the stock of material or supplies used or intended for use in said business, situate upon the premises, 947 Liberty street, Pittsburgh, or the store room across the alley in the rear thereof, or elsewhere. By the terms of this agreement, the corporation undertook to "pay or cause to be paid any and all claims or demands for stock or material bought and delivered on or prior to December 31, 1891, in and about said business or in transit on said day." By the same agreement the appellants undertook to "pay or cause to be paid any and all claims or demands now unpaid for stock or material bought or delivered since December 31, 1891." On the 21st of November, 1891, H. M. Doubleday, manager for the Electrical Supply and Construction Company, which was in reality the North American Construction Company, gave an order for certain globes and other glassware used in connection with electric lighting, to A. R. Fleisman, who seems to have been the agent of the Pittsburgh Glass Company, the appellee here. This order attached

to the statement of the plaintiff below is not printed in the paper-book of either appellant or appellee. It is essential, however, to an understanding of the case, and would seem to be a controlling element in fixing the rights and liabilities of the parties respectively. It directs as follows: "Please ship by freight to us at Pittsburgh, Pa., (then follows an enumeration of the articles to be shipped); all to be delivered in sixty days: shipments made as called for." An invoice of the goods specified in the order was made on the same day, and it would seem from the evidence as if the goods had been packed and set apart for delivery. Several small shipments were made as ordered, both prior and subsequent to the 31st of December, 1891.

Suit was brought originally against the North American Construction Company, and the appellants, who, as partners, were doing business under the name of the Electrical Supply and Construction Company. No appearance was entered for and no plea filed by the North American Construction Company, and it would seem that issue was joined and tried only between the Pittsburgh Glass Company, plaintiff, and H. M. Doubleday, Walter B. Childs, Walter H. Stone and William D. Card, partners, doing business under the name of the Electrical Supply and Construction Company, defendants. After verdict and upon the argument of a motion for a new trial, the record was amended by leave of court, by striking out as defendant the name of the North American Construction Company, and discontinued the suit as to it, so that we have here as appellants only the individual partners aforementioned, trading as the Electrical Supply and Construction Company.

The appellants do not deny the contract as made by H. M. Doubleday, one of their number, then manager for the Electrical Supply and Construction Company, then a branch of the North American Construction Company, as made in and by the order of November 21, 1891. It is not denied that the plaintiff below complied with the term of the said order by packing and setting aside for shipment as called for, all of the supplies contained in the said order. They made no objection below and raise none here, as to their liability to the plaintiff under the agreement with the North American Construction Company of April 15, 1892, if they are on other grounds liable to account to the plaintiff for the balance of the goods not actually shipped, which were destroyed by fire April 9, 1892. The evidence shows that goods to the amount of \$8.57 were shipped prior to December

31, 1891, on the orders of the North American Construction Company, and that subsequent to that date shipments amounting to \$11.79 were made at sundry times upon its order.

At the close of the plaintiff's testimony on the trial in the court below, the defendant moved for a compulsory nonsuit. The motion was refused by the court and this refusal constitutes the first assignment of error. The second assignment relates to that part of the charge which reads as follows: "I say, under the agreement that they have given here, I see no reason why judgment should not be rendered against the defendants for the amount of the order." This instruction to the jury was undoubtedly erroneous, so far as that portion of the goods contained in the order and delivered prior to the 31st of December, 1891, is concerned. The defendants, however, suffered no injury thereby, for the plaintiff before closing its testimony expressly remitted the claim of \$8.57 for goods delivered prior to the 31st of December, 1891, and asked judgment for the balance—\$300.38—with interest from February 21, 1891, which seems to have been the amount of the verdict. Whatever may be said as to the adequacy of the charge of the court below, we do not see that the appellants suffered thereby. The entire contention of the appellants is that the goods ordered on the 21st of November, 1891, were packed and set apart in the factory of the plaintiff, and that this, taken in connection with the rendering of the invoice for the same, constituted such a delivery at the time as vested the property in the North American Construction Company and relieved them, the appellants, from the payment of the claim, under the agreement of the 15th of April, 1891. It is doubtless true that as between vendor and vendee the acts above referred to constituted such a delivery as could have vested the title to the property in the North American Construction Company, and would have done so, if the parties had so agreed: *Commonwealth v. Hess*, 148 Pa. 98. The appellants, however, entirely ignore the contract of sale which must be the law governing the parties. Keeping in mind the distinction between delivery which denotes the transfer of title and that which denotes the transfer of possession, it seems to have been the intention of the parties, as shown by their agreement that the property was to be delivered, as far as title was concerned, in sixty days, and that shipments which changed the possession were to be made as called for.

"Ordinarily, and in the absence of an agreement to the contrary, the seller is under no obligation to send or carry to the buyer the goods

sold. His duty is fulfilled by so placing them at the disposal of the buyer that they can be removed by him. Having done this, an action lies against the buyer for goods bargained and sold, even though the goods may never have left the seller's possession: 21 Am. & Eng. Enc. of Law, 524. There is evidence that the defendants not only had the goods in their factory ready to fill shipping orders, if they had been received, but so notified Mr. Doubleday, the manager of the North American Construction Company. The law, therefore, would import delivery in accordance with the terms of the order for the goods which constitutes the contract between the parties thereto, at the end of sixty days from its date, which would be February 21, 1892. The appellants seem to admit, if there was no actual delivery of the property on the 21st of November, 1891, the date of the invoice, as contended for, they would be liable for but \$11.79 only, the amount of goods ordered shipped subsequent to the 31st of December, 1891, and prior to the 29th of April, when the remainder of the goods was destroyed. But this contention also ignores the agreement, under which the goods were "all to be delivered in sixty days." Under the terms of the contract made by the North American Construction Company with the plaintiff, the property in the goods ordered passed by virtue thereof to the former on the 21st of February, 1892. The appellants were therefore liable to the plaintiff for all of the goods embraced in the order of the 21st of November, 1891, except such as had been shipped prior to the 31st of December, 1891. The verdict included only this amount and the judgment entered thereon should be allowed to stand.

Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following judgments for the Western District were filed Monday, October 5, 1896:

PER CURIAM:

Gardner et al. v. Gardner et al. C. P. of Clarion Co. Judgment affirmed.

Daugherty Typewriter Co. v. The Kittanning Iron & Steel Manufacturing Co. C. P. of Armstrong Co. The decree is affirmed and appeal dismissed with costs to be paid by the plaintiff.

Neal v. Black et al. C. P. No. 1, of Allegheny Co. The decree is affirmed and appeal dismissed with costs to be paid by appellant.

By DEAN, J.:

Metzger v. Borough of Beaver Falls. C. P. of Beaver Co. Decree reversed and injunction issued.

Imbrie, Executor, v. The Manhattan Life Insurance Co. (Four cases.) C. P. No. 2, of Allegheny county. Judgment affirmed.

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PITTSBURGH, PA., OCTOBER 14, 1896.

Supreme Court, Penn'a.

WHITE et al. v. CITY OF MEADVILLE et al.

The Act of May 23, 1874, authorizing cities of the third class to supply water to the public, and the Act of April 29, 1874, authorizing the incorporation of companies for the same purpose, being enacted at the same session of the Legislature, come within the rule governing the construction of statutes in *pari materia*, and are to receive a construction which, if possible, will give effect to each.

Cities of the third class have authority to erect and operate water works, or may make contracts with and authorize others to perform the same public service; but when the end is accomplished by either method, it is not intended that the other shall be put into operation at the same time.

Where there are grants to distinct corporations for public purposes, the court will hesitate long in assuming that the Legislature intends such conflict shall arise in the exercise of their franchises as will result in the practical destruction of the property of any of them, without compensation.

In *Howard v. Millvale Borough*, 162 Pa. 374, no question was raised as to the authority of the borough to engage in the water business in violation of its contract with the water company. In assuming that the borough had such authority, a mistake is made.

Lehigh Water Company's Appeal, 102 Pa. 115, distinguished. In that case the municipality, by special acts of the Legislature, had authority to construct and operate water works, and the authority so conferred was not taken away by the subsequent general legislation.

Bill in equity for injunction to restrain the city of Meadville and the councils from issuing bonds for the construction of a system of water works.

June 5, 1895, order filed taking original jurisdiction of the bill, and on June 8, 1895, a referee was agreed upon by the parties who took testimony and filed his report, and on exceptions thereto, by both plaintiffs and defendants, the cause was argued in the Supreme Court on October 7, 1895, and reargued May 5, 1896.

For plaintiffs, *Carl I. Heydrick, C. Heydrick, D. T. Watson and John G. Johnson*.

For defendants, *Arthur L. Bates, Thomas Roddy, George W. Haskins and John O. McClintock*.

Opinion by DEAN, J. Filed October 6, 1896.

The city of Meadville was incorporated by

Act of February 15, 1866, and supplements of 26th March and 6th April, 1870. Its municipal powers and privileges are also regulated by the general Act of May 23, 1879, for government of cities of the third class. Before the adoption of the present Constitution its debt exceeded two per cent. of the assessed value of its taxable property. On the 16th of December, 1873, an election was held to determine whether the city should construct municipal water works to supply the inhabitants with water; the vote was 177 for and 819 against the proposition. Then, August 5, 1874, the mayor was authorized by councils to appoint a committee to confer with citizens on the subject of a supply of water, and the committee was appointed. No written report seems to have been made, but on the 13th of August, following, it was resolved by councils that the proposition of Dick and Gill, and others, be accepted; then, on October 23, 1874, a committee of councils and the mayor were authorized to contract for the construction of such works with the "Meadville Water Company" as soon as the company was duly incorporated. Articles of association were then entered into by one hundred citizens and taxpayers for the formation of the company, which was duly chartered 30th of October, 1874, and on 7th of November a contract was signed by the mayor for the city, attested by the clerk, and by the proper officers of the company. This contract provided for a supply of water for all city purposes, in pursuance of the authority conferred by their charter to supply the public, and further, that connections with the water mains should be made on all the streets for hydrants, public buildings, markets, fountains, etc., such connections to be designated by the city. The grades of all streets, lanes and alleys where water mains should be laid were to be furnished by the city, which should grant the right of way through all such streets, lanes and alleys. For furnishing water for city purposes, the company was to be paid \$8,000 annually. The contract was to continue ten years, and then for another ten years, with some change of compensation for fire hydrants. The company then proceeded with the construction of its works, and completed the same at a cost of about \$185,000. The city made annual appropriations to pay for the water furnished for city purposes, up until 1893, when further payment was refused, on the ground that the original contract was invalid for want of proper ordinance authorizing the same.

On September 21, 1894, city councils passed an ordinance that \$75,000 of city bonds should be issued for the purpose of constructing new

municipal water works. Notice was then given of an election for the proposed increase of debt, in which it was stated the assessed valuation of the city was \$2,030,000, and the existing debt \$61,500; that the proposed increase of debt for the construction of the water works was three and seven-tenths per cent. The majority of the voters favored the increase of debt; councils, then, on March 11, 1895, adopted this ordinance: "That a system of water works be built and erected for the use of the city of Meadville for the purpose of supplying said city with water, and such persons and corporations as may desire the same; to be made and completed in accordance with the plans to be provided by the civil engineer of the city."

The city engineer prepared plans for the new works, embracing about 22 miles of mains, to be put down on the streets and alleys of the city, reaching for the most part all the consumers of water supplied by the old company; further, the city entered into a contract with Chandley Brothers & Company for the construction of the works in accordance with the plans of the city engineer, the price to be paid being \$104,723, not including cost of land for pumping station, water wells, reservoir, or right of way through private land. These plaintiffs then filed this bill to restrain the city from carrying out the contract; they averring in said bill: (1) Illegality and irregularity of election for the increase of debt. (2) That the proposed increase of debt exceeded the constitutional limit of municipal indebtedness. (3) That the construction of municipal works, in view of the contract of the city with the Meadville Water Company, was without authority of law; and even if the power existed, the proposed exercise of it was a gross abuse of the power. The city filed answer, denying all the material averments of plaintiffs' bill, and conclusions of law therefrom, and further affirmatively alleging the original contract to be invalid, not being authorized by proper ordinance, and therefore not binding upon the city. By agreement of the parties, Theodore Lamb, Esq., was appointed referee, to report facts and conclusions of law. He made report, and on the facts concludes:—

1. That although there was no formal ordinance authorizing the contract, the city, by subsequent distinct, unequivocal acts, running through years, had ratified it, and was legally bound by its terms.

2. The irregularities attending the election on the question of increase of indebtedness were not sufficiently grave to invalidate it.

3. That the proposed increase of indebtedness,

by the contract with Chandley Brothers & Company for construction, added to the existing bonded indebtedness of the city, did exceed seven per cent. of the taxable property, and was therefore void, being a violation of the Constitution.

4. That the city had full power to make the contract, if the debt had not exceeded the constitutional limit. It is therefore suggested an injunction issue to restrain the city from further proceedings with the construction of the municipal works. Both parties have filed exceptions to this decree. We fully concur in the referee's findings of facts, and approve all his conclusions of law except the 10th. This disposes of all exceptions on both sides but the plaintiffs' 5th exception, which is to the referee's conclusion that the city had power to make a new contract, notwithstanding its liability on the old one. It is perhaps needless to say the question is not altogether free from difficulty, and we might avoid passing upon it in this particular case; but the same question is already before us in one other case, and like circumstances existing in perhaps a hundred others, involving millions of property, may raise it in the future; therefore our plain duty is to pass upon it here. We have had the aid of full and able argument on each side; the full bench has given it prolonged and complete consideration in all its aspects, and, as a result, this judgment is fully concurred in by every member of the court.

As before noted, the question is raised by the referee's 10th conclusion of law, as follows:

"10. In the opinion of the referee, the right of the city of Meadville to build water works, is one governed by legal considerations alone.

"Has the city power to do so? If so, the works may be constructed, and no equitable considerations can stay her hands.

"When the Meadville Water Company constructed its plant it did so with knowledge that the city had the right to construct water works at any time; and it was bound to know that the city had the right to reconsider its determination not to do so at any time.

"The building of other works may, and undoubtedly will, seriously affect the present company, but the loss that may occur is one for which the law allows no compensation.

"It seems to me that the case of *Lehigh Water Company's Appeal*, 102 Pa. 515, and *Millvale Borough*, 162 Id. 374, fully settle this doctrine."

The general borough Act of 1851, under which Meadville first became a municipality, gave authority to boroughs to light the streets, "to provide a supply of water for the use of the inhabit-

ants * * * to make all needful regulations for the protection of pipes, lamps, reservoirs, and other construction or apparatus, and to prevent the waste of water so supplied."

This clause was re-enacted in the city special charter of 1866, with the addition of authority to supply itself with water for fire purposes. And so the authority continued, as the referee finds, down to August 13, 1891, when, by proper official action, it accepted the provisions of the Act of Assembly of May 23, 1874, providing for the organization and government of cities of the third class, in which class it took its appropriate place. That act authorizes cities of this class in their corporate capacity to supply with water the city and such persons, partnerships and corporations therein, as may desire the same, at such prices as may be agreed upon, and for that purpose have at all times the unrestricted rights to make, erect and maintain, all proper works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water, or to make contracts with, and authorize any person, company or association to erect all proper water works, machinery, building, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water, and give such persons, company or association the exclusive privilege of furnishing water as aforesaid, for any length of time not exceeding ten years."

The 50th section of the same act, in order to effect the powers thus given more fully, authorizes the purchase by the city, at such price as may be agreed upon, the rights, privileges and franchises of any water company then in operation, and thereafter to exercise all the powers of the company so purchased. The 53d section confers on the city the right of eminent domain, and authorizes it to appropriate such lands and property as may be required in the construction of water works.

The corporation Act of 29th April, 1874, gives to water companies the right to introduce into boroughs and cities, wherever they may be located, a sufficient supply of pure water, and when completed, its right in the locality covered by its works is exclusive, until during a period of five years, the company has divided among its stockholders a dividend equal to 8 per cent. upon its capital stock. Then it is made lawful, after twenty years from the introduction of the water, for the municipality to become the owner of the water by paying the cost of erecting and maintaining the same, with interest thereon at the rate of 10 per cent. per annum, deducting from such interest, however, any dividends theretofore declared.

Both acts were passed at the same session of the Legislature within four weeks of each other. They are very elaborate, apparently making provision for every contingency that occurred to the legislative mind at the date of their passage, and clearly, from the proximity in dates of their discussion and enactment, no provision in the later act was intended to repeal the first, directly or by repugnancy. In *Smith v. People*, 47 N. Y. 330, is this apt language, applicable to such facts:—

"Statutes enacted at the same session of the Legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in para materia*. Each is supposed to speak the mind of the same Legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session."

Here, then, plainly, were two distinct methods by which a municipality could supply its citizens with water. By putting either method in operation, the same end was accomplished; that is, the supplying of the citizens with water. There is no repugnancy in the provisions of the two acts, on the assumption that one or the other alone will be adopted, to effect the purposes. There will be a decided repugnancy in their operation, if both be put at work at the same time to effect that purpose. If anything be manifest, it is, that if two water mains be laid side by side, on the same street, equally accessible to the householder on each side, conveying double the quantity needed; with double sets of hydrants, pumping stations, offices, salaries and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support the private corporation system; such a conflict of interest will inevitably bankrupt the system which depends on the voluntary patronage of the public. We hesitate to assume, every court is bound to hesitate long before assuming, the Legislature intends by grants to distinct corporations for public purposes, there shall arise such conflicts in the exercise of the franchises as will result in the practical destruction of property of any citizens without compensation. It is a cardinal rule of construction between older and younger grant of franchises, the sovereign does not intend the younger shall infringe upon the older; but to assume these franchises can be in existence and

operation at the same time, is to assume the Commonwealth has granted precisely the same thing to the municipality that it has already granted to the water company; for in a business view, the contemporaneous exercise of the franchises is impossible. Therefore, in approaching the consideration of the words of the acts, the judicial mind at the start must incline against the conclusion of the learned referee. Consider, then, the words of clause 9 of the 20th section of the Act of 23d of May, 1874; the city is "to have at all times the exclusive right to supply itself with water, and such persons, partnerships and corporations at such prices as may be agreed upon." This is the grant by the Commonwealth of the power or authority to its creature, the municipality, which without the grant was helpless, in this, purely commercial matter. It was not an exercise of governmental power, which would be implied from the mere creation of a municipality. In *Savings Fund Society v. Philadelphia*, 31 Pa. 185, this court, in discussing this question, adopted this language:—

"As a local sovereign it (the city) had no authority to enter into the business of manufacturing and selling gas, for its sovereignty did not extend to such subjects any more than it did to almost any other manufacture. It is true, a municipal corporation is not bound by any engagement which prevents a discharge of the duties imposed upon it by its organic law, for the plain reason that such engagements are contrary to law. But when such a corporation engages in things not public in their nature, it acts as a private individual, no longer legislates but contracts, and is as much bound by its engagements as is a natural person. The distinction between public duties and private business is wide and obvious."

Therefore, the grant specifically of the means by which the power may be executed is given. It shall have the unrestricted right to erect and maintain proper water works, machinery, buildings and reservoirs, to convey and distribute the water. First, is the exclusive power to supply itself, and then the powers incident to and necessary to make the first power effective. To have granted the right only to supply itself, would have left a doubtful implication as to whether it might erect its own works, or should buy its supply from corporation dealers in water. But after the grant of the right to supply it, and the one method of exercising the right, it occurs to the legislative mind, as all such grants are strictly construed, and this prescribes but one method, the city may be shut up to that one. The Legislature, only twenty-four days before, had enacted that water companies might be au-

thorized to supply water and should have power to erect and maintain all works and machinery necessary and proper for raising and introducing into the town, borough, city or district where they may be located, a sufficient supply of pure water. Here was another kind of corporation than municipal, empowered to convey and distribute water to cities and towns. The city may not desire to erect and manage its own water works; may prefer to purchase water; then comes the grant of a second method of supplying itself with water: "Or to make contracts with and authorize any persons, company or association," to convey and distribute the water for any length of time not exceeding ten years. The primary grant was the power to supply; the secondary one, the grant of two distinct methods of exercising the power, either of which might be adopted. There was no grant of power to put both methods in operation at the same time, for once the power has been exercised to supply the city by contract through another creature of the same sovereign, then the municipal function has passed from the city, and must be performed by the other contracting party, which last has rights and obligations imposed upon it by law, as clearly defined and as capable of enforcement as those of the city. As long as the city keeps within the scope of its powers to bargain, it must stand by the bargain the same as an individual. We do not doubt the Legislature could, by the Act of May 23, 1874, have granted to the city the right to change back and fourth from one method of supply to the other, as whim or interest might dictate. It is sufficient to say, it did not do so. This view of the scope of the legislation on this subject accords with the known facts. A municipality, in its beginnings, is perhaps not financially strong, or its debt may approach the constitutional limit so closely that it cannot borrow; nevertheless, the low state of its financial condition does not render less urgent the necessity of water supply. It can obtain it in but one way, by contract with those who have the money and are willing to invest their private capital in the construction of water works. The Legislature knew capital would not be invested in such an enterprise, if in the future it were liable to confiscation by competition with a public enterprise operated from a municipal treasury, capable of replenishment from the pocket of the taxpayers.

That fact suggested clause 7 of the Corporation Act; the municipality will not be forever poor; the time will come when it will be of financial ability to own and operate its own works. The

very fact of having a supply of water on an investment of private capital, has tended to stimulate its growth, and to largely appreciate the value of taxable property; therefore, says the Legislature:

"It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city or district into which the said company shall be located, to become the owners of said works, and the property of the said company, by paying therefor the net cost of erecting and maintaining the same, with interest thereon, at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared: *Provided*, That nothing in this section contained shall authorize a company incorporated under the provisions of this act to construct gas or water works within the limits of any municipality, when gas or water works shall have been constructed by said municipality, without the lawful consent of the corporate authorities thereof: *And provided further*, That the Court of Common Pleas of the proper county shall have jurisdiction and power upon the bill or petition of any citizen using the gas or water of any of said companies to hear, inquire and determine as to the charges thereof, for gas or water, so furnished, and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce obedience to other decrees by the usual process.

It is correct as argued by defendants, that this clause is repealed by the Act of May 23, 1889; but as between these contracting parties whose rights vested at the adoption of the contract, the subsequent act could not divest them. If the Act of 1874 had provided the works should be taken at their actual value, and then had enacted a merely different form of procedure to ascertain the value, the contract right would not perhaps have been affected by the Act of 1889. But where the value is a fixed one, the net cost with interest at 10 per cent. per annum, deducting dividends, the result is one of computation. There is no room for discretion or judgment, which may be exercised under one form of proceeding as well as another. Both the contracting parties must be presumed to have had in view the law which empowered them to contract, and which became part of the contract. At the end of twenty years the defendants have a right to take the works at a price fixed by the law, and that is one of computation. True, as to the city, the taking of the works is only permissive. It is not bound

to take them, while if the city demands, plaintiffs are bound to surrender them. But if the city does not choose to become the owner of the works in the mode pointed out in the act, it has no power to destroy their value by duplicating them at the expense of the taxpayers.

As to the question raised by clause 3, we decline to discuss it, as it has no bearing on the one before us. It will be time enough for that when two private corporations seek to exercise their franchises in the city at the same time.

The argument, that by this construction the citizens are in the power of a private corporation, having the sole authority to determine the prices, quantity and quality of the water supply, is completely answered by the second proviso 7, and subsequent legislation regulating the conduct of water companies: *Brymer v. The Butler Water Company*, 172 Pa. 489; *Com'th v. Russell*, Id. 506. The two cases cited by the referee as sustaining his decision (*Lehigh Water Company's Appeal*, 102 Pa. 515; *Howard v. Millvale Borough*, 162 Id. 374) are in apparent conflict with this judgment. The language of the court, to some extent, on both cases, would lead to a different conclusion than the one to which we have come. The first case on its facts, however, is not the same as this. By the supplement to the act incorporating the borough of Easton, March 12, 1867, the town council was authorized to construct and provide water works and elect water commissioners. Then, by another supplement, April 15th of the same year, the borough was authorized to construct or purchase water works. In this case the municipality had by these special acts, with the consent of the majority of voters, the authority to erect its own water works, and this special legislation constituted part of its corporate power antedating the present Constitution, and the Acts of 1874. By the schedule to the Constitution it is declared: "All laws in force in this Commonwealth at the time of the adoption of this Constitution, and not inconsistent therewith, and all rights, actions, prosecutions and contracts shall continue as if this Constitution had not been adopted." It was held the authority conferred by the special Acts of 1867 was not taken away by the Act of 1874, giving the exclusive right to the water company. When it is noticed, the controversy turned on the repeal or non-repeal of the special acts, and whether the borough had by inaction under the special law, lost its right to construct municipal works, the distinction between the case and the one before us is obvious. Without referring to what was said by Justice PAXSON in delivering the opinion, and considering only what was

decided, there is no conflict between that case and this.

In *Howard v. Millvale Borough*, *supra*, it was assumed by all parties in the court below, and by the learned judge of that court, that the authority of the municipality to violate its contract existed. On the appeal, the point raised in this case was scarcely touched upon in the argument. With the greatest reluctance on the part of every member of this court, the decree of the court below was affirmed; that reluctance is expressed in no doubtful language by our Brother GREEN, who delivered the opinion. In fact, it was assumed by all counsel in both courts, that *Lehigh Water Company's Appeal*, *supra*, disposed of the contention on that point, and the case went against the water company on other grounds. It was a mistake. We now are glad of the opportunity for correction, especially so, because the example of Millvale borough seems to have lead other municipal corporations to adopt the same course of action. *Luzerne Water Company v. Toby Creek Water Company*, 146 Pa. 566, also cited by the defendants, was a controversy between two rival companies, and the power of the municipality did not come in question.

Therefore, in this case, we are of opinion, for the reasons given, that the 5th exception to the learned referee's 10th conclusion of law should be sustained, and it is decreed accordingly. Further, it is directed that the said defendants, and each and every of them, be restrained by a permanent injunction from entering into contract for the construction of a water works in accordance with the plans prepared by the civil engineer as aforesaid. It is further ordered that defendant pay the cost of this proceeding.

[See next case.]

METZGAR v. BEAVER FALLS BOROUGH et al.

The water company having been incorporated under the Act of April 29, 1874, constructed its works and supplied the public, with the consent of the municipality, the borough is afterwards without authority to construct and operate a water works.

The Legislature did not intend to commit the duty of supplying water to the public within the municipality to two different agencies, both in operation at the same time.

Appeal of Martin Metzgar, plaintiff, from the decree of the Court of Common Pleas of Beaver county, upon a bill in equity filed against the borough of Beaver Falls *et al.* to restrain the defendants from erecting a water works.

For appellant, *Lyon, McKee & Sanderson*.

Contra, *E. B. Daugherty, Louis E. Grim and J. R. Martin*.

Opinion by DEAN, J. Filed October 5, 1896.

This appeal was argued first, 4th June, 1895, in the Middle District. Before the decision was handed down we had notice by application to take original jurisdiction of the case of *White v. City of Meadville*, argued at Pittsburgh, 7th October, 1895, involving some of same questions. Decision was therefore withheld until after the argument of that case; then followed an application for reargument of both cases; this was granted, and reargument had 6th of May, 1896. We have handed down this day the opinion in *White et al. v. City of Meadville*, and on the main question it rules this case against defendants. The learned judge of the court below cited and relied on *Howard v. Millvale Borough*, 162 Pa. 374, as ruling the question before him. In *White v. Meadville* we, after a full consideration, have concluded the decision in that case should not be followed. The question at issue, on the answer of which the case turns, appears from the following passage in the opinion of the court below:

"Nothing need be said here on the controverted questions as to the wisdom of constructing water works; the sufficiency and character of the present water supply; the effect of the proposed new works on the business of the Union Water Company, and whether the company has failed in the performance of its duty. With these and like matters the court has nothing to do in the present proceeding. I cannot control or strike down the power and discretion vested in municipal authorities. The right of the borough of Beaver Falls to construct, own and operate water works is undoubted. Whether or not this right shall be exercised is a matter to be determined by the corporate authorities; and unless they have clearly violated the laws prescribing the manner in which their power shall be exerted, I cannot interfere: *Howard's Appeal*, page 374.

To this defendant excepts and alleges: "The borough has no power in this behalf beyond what is delegated to it by the Commonwealth. Its sole power is, in the language of the statute, 'to provide a supply of water for the use of the inhabitants.' This has been done. The inhabitants are supplied by the authority executed by other means. The duty of the borough has been thus executed. Its power has been supplanted and sustained. It has no authority to erect water works at the expense of taxpayers while such other means are operative."

We have decided in *White v. Meadville*, on the construction of the Acts of Assembly, the Legislature never intended to commit the duty of supplying water to a municipality, to two

different agencies both in operation at the same time. The borough had authority "to provide a supply of water for the use of the inhabitants," this supply was provided by the Union Water Company, subject to such regulations in regard to streets, roads and grades as the borough imposed. The borough did not attempt to construct water works until years after the water company had laid its mains and the public had been served. The rights of the water company, vested by consent of the municipality and its contract to supply water for public purposes. The rights of the company are fixed by the Act of 29th April, 1874, under which it came into existence, and so are its obligations. If, as alleged, it fails to furnish a sufficient supply of pure water, the courts are open to any complainant: *Brymer v. The Butler Water Company*, 172 Pa. 489.

After twenty years the borough has power to purchase the works at a price not exorbitant. We concur with the court below in its finding of facts, but not in its conclusions of law, as already noticed.

Therefore, the decree is reversed, and it is directed that an injunction issue restraining the borough of Beaver Falls and its officers from creating the proposed indebtedness of \$123,000 for the construction of water works, or any part thereof, and from issuing bonds to secure the same, or any part thereof. Further, that said defendants be enjoined from executing any contract for the construction of the proposed water works.

Further, that the said borough and its officers be restrained from passing any ordinance, or doing any other act, matter or thing in furtherance of its purpose to increase its indebtedness, or erect said water works as aforesaid. It is further directed that defendants pay the costs of this proceeding.

[See preceding case.]

Court of Common Pleas No. 2.

In re Application of "THE ACCOUNTANTS' ASSOCIATION OF PITTSBURGH" for a Charter.

An application for a charter made on separate sheets of paper, fastened together by red tape, is too easily subject to alteration.

An application for a charter should state clearly its purpose, it means of getting property and the qualifications for membership.

No. 152 July T., 1896. Application for charter.

At above number and term an application for incorporation was filed by A. H. Burchfield and others, who had organized "The Accountants'

Association of Pittsburg," and desired to obtain corporate rights and privileges for the same. The petition, proposed charter, etc., were typewritten on single sheets of ordinary typewriter paper, tied together with red tape. The foregoing papers set forth that "The purposes for which this corporation is formed are to promote intercourse and friendship among accountants, to raise the standard of office work in all its branches, and to obtain employment for and otherwise assist deserving members." The remainder of the contents of said papers consisted of the usual averments as to the name, place of business, etc., of the proposed corporation and that it had no capital stock.

Opinion by WHITE, J. Filed May 26, 1896.

I cannot approve this application for a charter for several reasons, briefly stated:—

1. The application and provisions for incorporation are on separate half sheets of blotter paper, only tied together by tape. It would be easy in such a case to detach some and substitute others, or to attach the certificate of incorporation to something else.

2. The purpose stated is too indefinite, and nothing indicated as to how the purpose shall be carried out.

3. The proposed corporation is to have no capital and no shares. Having no property it will have no permanent location, and no means of paying debts.

4. No indication who can become members, or on what terms or conditions as to age, sex or otherwise.

5. There is no apparent necessity or reason for such a corporation. The stated purpose can as well be carried out by a simple society or association.

6. It does not come within the letter or spirit of the Acts of Assembly authorizing incorporation.

For these reasons I cannot give the certificate required by law and the application is therefore refused and dismissed.

Court of Common Pleas, WESTMORELAND COUNTY.

TAYLOR v. BOWLING.

The Act of May 22, 1895, of itself creates no lien on real estate for taxes. The Act of June 2, 1881, having been declared unconstitutional, county taxes are not a lien on real estate payable out of the proceeds of sheriff's sales, except in counties having local laws in regard to taxes.

No. 10 May T., 1896. Exceptions to auditor's report.

Opinion by DOTY, P. J. Filed September 4, 1896.

Seated lands were sold by the sheriff. On distribution, the sum of \$22.58 was awarded to the tax collector of the borough of Greensburg. The question whether such taxes are to be paid out of the proceeds arises on exception by a lien creditor.

Since *Burd v. Ramsey*, 9 S. & R. 109, the rule has been that the mere assessment of a tax against seated land creates no lien. A lien for taxes can only be created by statute. There is no local law upon which the collector can rely. The Act of June 2, 1881, P. L. 45, was held unconstitutional in *Van Loan v. Engle*, 171 Pa. 157. A lien, however, is claimed by virtue of the Act of May 22, 1895, P. L. 111. As observed in *United Security Life Ins. Co. v. Dougherty*, 5 District Repts. 522, the title of the Act of 1895 gives no intimation of a purpose to create a lien. It is entitled an act for "divestiture of liens of taxes." If the purpose of the act was to confer a lien, such purpose is not clearly expressed in the title. The title of the Act of 1895 is in marked contrast to the title of the Act of 1881, already referred to, and which is entitled "An Act to make taxes assessed upon real estate a first lien, and to provide for the collection of such taxes and a remedy for false return." Aside from the question as to the sufficiency of the title, the act itself does not in express terms create a lien.

That a lien is not created by necessary implication is satisfactorily demonstrated in *Wetzel v. Goodyear*, 5 District Repts. 12, and in *United Security Life Ins. & Trust Co. v. Dougherty*, *supra*. When the conclusion is reached that the statute neither expressly nor by implication creates a lien, it follows that the exception must be sustained and the claim for taxes be disallowed. It seems necessary either to hold that the statute was not intended to create a lien for taxes, or to hold that it is in violation of section 48, Article 111, of the constitution, which requires that the subject of a bill be "clearly expressed in its title."

It seems plain that the Legislature had in view exactly what is set forth in the title and provided for in the body of the act. The object was to provide for the "divestiture of liens of taxes," and to make uniform the practice in paying taxes out of the proceeds of sales made by the sheriff and other officers. This object is manifest from the language of the title and from the preamble, which recites: And whereas, uncertainty has existed among sheriffs and other officers making such sales whether they should pay taxes out of the proceeds in their hands."

It may be there was no reason for uncertainty, as the Act of 1881 was specific enough, but the fact is the practice under said act was not uniform. To remove doubts and to secure uniformity of practice, it was enacted that "the lien of taxes now or hereafter to be levied or assessed against any real estate within this Commonwealth shall be divested by any judicial sale of such land." This assumes that such taxes would be a lien. Such assumption was not unfounded, as the Act of June 2, 1881, P. L. 45, was then supposed to be in force. It was afterwards held invalid and unconstitutional.

Because the general law making taxes a lien has been declared unconstitutional is no reason why a forced construction should be placed on the Act of May 22, 1895. No lien is expressly created, and there is nothing in the Act which gives intimation of an intention to make taxes a lien on real estate.

The tax claimed in this proceeding was not a lien on the real estate sold by the sheriff, and therefore is not entitled to share in the distribution.

For exceptions, *Taylor*.

Contra, Robbins & Kunkle.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

Rule of Court in Regard to Certificate of Amount in Controversy—Adopted October 12, 1896.

In all cases of appeal directly to this court from any court of first instance, in which the amount of money or value of property in controversy, for purposes of jurisdiction, does not affirmatively appear in one of the modes prescribed by section 7, clause c, of the Act of June 24, 1895 (the Superior Court Act), the appellant shall be required to file with his appeal a certificate of the judge hearing the case, that the value of the property, right, or matter really in controversy is greater than \$1,000, which certificate shall be printed in the appellant's paper book immediately after the docket entries.

For want of such certificate the writ may be quashed.

If the facts on which to base the certificate do not appear in the course of the trial or hearing, the judge shall require the parties to produce evidence thereof for his information in order to make such certificate. PER CURIAM.

—The right of a married woman to dedicate her statutory real estate to public use is held, in *Van Sandt v. Wier* (Ala.) 32 L. R. A. 201, to be limited to the method prescribed by statute; and the doctrine of equitable estoppel is held ineffectual to deprive her of such estate.

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PITTSBURGH, PA., OCTOBER 21, 1896.

Supreme Court, Penn'a.

THE UPPER TEN MILE PLANK ROAD CO. v. BRADEN.

A plank-road company, having condemned a right of way over a farm, made a cut therein ten feet deep, and in doing so a spring of water was opened three or four feet above the roadway. *Held*, that the title to the water was absolute in the owner of the farm, and that he could use it as he saw fit, provided he did not injure the company's road.

The right of the company to drain the water off its roadbed did not give it any right to appropriate the spring itself, or to exclude the owner therefrom.

Appeal of William H. Braden, defendant, from the decree of the Court of Common Pleas of Washington county, upon a bill in equity for an injunction to prevent defendant from interfering with a spring within the limits of plaintiff's right of way.

For appellant, *Albert S. Sprowls*.

Contra, *Clark & Berryman* and *R. W. Irwin*.

Opinion by WILLIAMS, J. Filed January 6, 1896.

The report of the learned master deals in an able and logical manner with the questions of fact and law involved in this case. The conclusions reached have, however, as it seems to us, been influenced by an inaccurate definition of the respective rights of the owner of the soil and the owner of the easement of way over it. The findings of fact show that the plaintiff corporation is the owner of a wagon road, the right of way for which was obtained by the exercise of the right of eminent domain. This road passes over a part of a farm known as the Boyd Farm. In grading the road over this farm it became necessary to make a cut, the banks on the upper side of which were some ten or twelve feet high. In making this cut a fine vein or spring of water was opened which gushed out of the rocks some three or four feet above the roadway. For some years the water was used to supply a watering trough placed below the spring, and the surplus water was conducted away by means of a ditch on the upper side of the road-

way. More recently the corporation has removed this trough several hundred feet to the land of another farm owner, has inclosed the spring in solid masonry made watertight overhead as well as on the sides, and conducted all the water away and off the defendant's land by means of iron pipes, delivering a small portion of it into the new trough and making some other disposition of the rest of it. The defendant went in search of his spring and opened a hole into the cistern so that he could see what was being done with the water. He also insisted that he had a right to use the water for his cattle and expressed his purpose to blast away the rocks at that point and prepare a permanent and convenient place for the establishment of a watering trough for his own use and the use of the public. To prevent him from opening the watertight cistern built about his spring and to compel him to pay for repairing the damage done to it in his effort to find out what was being done with the water, this bill was filed and the case went to a master to hear the evidence and to make appropriate findings of fact and law under the old practice. The master held upon these facts that the spring belonged to the owner of the soil on which it was, but in his third conclusion of law held that "the title of the owner is so qualified by plaintiff's easement that the spring can only be enjoyed subject to the easement." This was a mistake, and it gave direction to all that followed. The plaintiff's easement qualified the manner in which the defendant might use his spring but it did not qualify his title. The title was as absolute and unqualified to the water as to the rocks out of which it issued, and the defendant had the right to take it where he pleased and use it as he pleased: *Mills on Eminent Domain*, p. 70. He had no right to use it in such a manner as to inflict injury on the plaintiff's roadbed but he had the right to use the whole of it, to conduct it by pipes wherever he desired, to consume it, to sell it, or waste it.

The plaintiff has no easement in the spring. It has a right of way for public travel over the land upon which the waters of this spring descended; and for the purpose of preserving its roadbed in a condition suitable for travel it may drain the water off. The right is one of drainage of the roadbed only. It is not right to appropriate, or to take exclusive possession of, the spring itself, or to exclude the owner therefrom: *Mills on Eminent Domain*, p. 71. The corporation had gone much farther in this case. It had taken exclusive possession of the spring. It had taken upon itself for some purpose the responsibility of preserving the absolute purity of the

water so that it could be delivered on the land of another person without contamination from surface water. For this purpose it had literally sealed it up in a watertight reservoir into which iron pipes were introduced by means of which the spring was transported off the land of the owner and set down some hundreds of feet away upon the land of another person. Because the owner was curious to know what was being done with his spring and had opened a hole into the reservoir that he might learn the situation, this bill was filed and a chancellor appealed to in order to restrain his curiosity by injunction, and to punish him for his temerity in seeking to know what the corporation was doing with his spring. An injunction has been decreed and damages have been assessed in accordance with the prayer of the bill. This result is due to the mistaken definition of the rights of the parties found in the third conclusion of law to which we have referred. The master and the court below have proceeded on the theory that the title of the defendant has been qualified and restricted by the easement of passage over the roadway so that as between him and the corporation, he has no right to the use of the spring if the corporation finds it convenient for the purposes of drainage to take exclusive possession of it and transport it to any point where it may wish to use it off the land of the owner. The true rule is that the easement qualifies not the title to the spring but the manner of its use. The corporation has a roadway at the side of which the defendant has a spring. Each must so use his own as to inflict unnecessary injury on the other, but neither can forcibly exclude the other from what is his own. It was neither against law nor against equity for the defendant to seek access to his spring, and although this may not have been done in a peaceable spirit it was nevertheless in the exercise of a clear legal right. The corporation may drain its road, but it cannot in the exercise of the right of drainage take forcible possession of this spring, exclude the owner from access to it, and transport it for its own use or for the use of any other person off the owner's land. The right of drainage does not include the right of appropriation, nor does it justify the forcible exclusion of the owner from access to a spring of water that comes to the surface on his own land outside the beaten track of the roadway. Subject, however, to the owner's right of access, the method of drainage to be adopted is for the corporation to determine.

The decree appealed from is reversed, the injunction is dissolved and the bill dismissed at the costs of the plaintiff.

FRAZIER v. THE BOROUGH OF BUTLER.

Where a change of grade of a street has been ordered by a borough, it is the duty of the authorities to see that it is effected without danger to travellers upon the street, and it is for the jury to say whether it was necessary to have the material used in the grading deposited in the street for a time.

The fact that one of the property owners whose lot abuts on that portion of the street which has been graded and at the point where the accumulation of the earth removed from the lot has been deposited, is a member of the borough council, does not operate as such notice to the authorities of the borough as to render it liable in damages to one sustaining injuries by reason of the existence of the unladen earth, should no other official negligence be shown.

Appeal of the Borough of Butler, defendant, from the judgment of the Court of Common Pleas of Butler county in an action of trespass, wherein Alexander Frazier was plaintiff.

The facts of the case are set forth in the opinion of the court.

The first assignment of error was to the charge of the court that the authorities having lowered the grade of the roadway several feet, it followed that the footway of the street must be lowered so as to conform. "The borough authorities must have known that, and it was their duty when that improvement was in progress to keep an eye upon it and note the manner in which it was done, providing the citizens in doing it occupied any portion of the driveway in making such improvement."

The second assignment was as to the charge of the court in leaving to the jury to say whether it was necessary to leave the pile of rubbish coming from the excavations of the sidewalk in the street and whether they had a right to occupy the street for that purpose.

The third assignment, the affirmation of plaintiff's third point, that as one of the property owners on the street whereof the grade was being changed was a member of the borough councils, his knowledge of the condition of the street was a notice to the whole body.

The fourth assignment was the refusal of the defendant's request to charge that no express notice having been given of the obstruction which caused the accident, that the borough was not liable.

The fifth assignment, the refusal of a point of the defendant that the owners of the property for the purpose of the work being conducted on their ground or in front of their ground, had a right to use the street and to pile rubbish arising from it for a time, and that it was not a nuisance *per se* and that the accident having occurred while the work was being done and the particular obstruction had not existed for

any definite length of time, there could be no recovery in the case. The verdict should be for the defendant.

For appellant, *T. C. Campbell and W. A. Forquer.*

Contra, S. F. Bowser, Everett L. Ralston and John B. Greer.

Opinion by DEAN, J. Filed January 6, 1896.

Peter Schenk and H. Schreideman owned two lots fronting 194 feet on Jefferson street, in Butler borough; the sidewalks were of boards, for which they desired to substitute permanent stone pavement, and accordingly they let the contract for the preparatory grading to Samuel Kidd. The grading was somewhat heavy, being a cut at one end and a fill at the other; the contractor commenced the work on the 16th March, 1892, and continued it until completed. During the progress of the work large piles of earth and rubbish were deposited on the street, which last between the curbs was twenty-five feet wide; a large part of this earth and rubbish was removed each day, but generally there remained each night a pile of that taken out, and this had been the case from the 16th of March, the commencement of the work, until the 24th, a period of eight days; but it was not the same that had been taken out the first day; may have been that deposited on the day before; the evidence seemed to show the contractor did not remove the earth and rubbish as fast as it was deposited on the street, the result being it was continuously encumbered with a pile of it, night and day. After dark, on the last named date, 24th March, the plaintiff was driving with a companion along the street in a buggy, at an ordinary speed, when his wheel struck the pile of rubbish, the buggy was upset, and he was seriously injured; there was no light or watchman to warn travellers of the obstruction. He brought suit for damages, and the jury, under the law announced by the court as applicable to the evidence, awarded him \$300. Judgment being entered on the verdict, defendant appeals, assigning six errors. The first is, to the instruction of the court, that as the year before the borough had cut down the grade of the street to a depth of several feet, it must have been known to the authorities that the sidewalks would be cut down to a grade to conform to the street, and it was therefore their duty to see to it, that by such work the street was not rendered dangerous, and unnecessarily obstructed. There was no error in this instruction. The streets and highways of boroughs are under the control and supervision of councils; if by municipal legislation, as here, very

considerable changes in grade of the driveway or street were made, rendering necessary considerable change in the sidewalks, care according to the circumstances, required close supervision on part of the borough authorities of the conduct of property owners. It was not the case of a property owner merely replacing an old boardwalk in front of his property with a stonewalk, where no over change was necessary, but that of the excavation to the depth of two feet to five feet for the breadth of the sidewalk of large quantities of earth and rubbish along the driveway of a much-used street only twenty-five feet wide. Clearly, it was the duty of the borough authorities, under such circumstances, to exercise more watchfulness, than under those involving no such danger to the travelling public.

The second assignment is to the instruction on the right of the lot owner to obstruct the street with the rubbish. The plaintiff alleged the piling of earth on the street was wholly unnecessary; that there was ample room on the owners' lots for the deposit of such material; but, that if it was necessary to use the street for this purpose, it was not necessary to leave any portion of it over night. The court left it to the jury to say whether, under all the circumstances, it was necessary to use the street as a place of deposit, and whether it was reasonably necessary to leave the material there for a day or several days. In this there was no error, he had already told them the temporary obstruction of the public streets for purposes of improvement, if a reasonable necessity existed therefor, was not unlawful, and the borough was not answerable in damages for permitting such obstruction; but whether this obstruction was reasonably necessary, was a question of fact, and this was for the jury to decide.

The third assignment is to the answer of the court to plaintiff's third point. Peter Schenk, one of the improving lot owners, who, through his contract with Kidd, deposited the rubbish, was a member of the borough councils; therefore, plaintiff put this point to the court: "That if Peter Schenk, a member of the town council, had knowledge of this obstruction, it visits notice on the municipal authorities." To this the court answered as follows: "In the absence of any evidence showing that the care of the streets had been committed to particular members of the town council, every member thereof must be taken as the agent of the borough. For that purpose a notice to a member must be regarded as notice to the body to which he belonged. It does not appear how frequently borough council met, and it would be intolerable

ble to hold, that the obstruction must be permitted to continue until the body would be assembled in an official meeting." In fact, this was no answer to the point, and if the verdict had been the other way, plaintiff might well have complained of the answer as not responsive to his point. The court was asked to say, that if Peter Schenk had knowledge of this obstruction, that was notice to the borough; this involved, first, a question of fact, whether he had knowledge; it did not follow, because he had contracted with Kidd to make the excavation, he had knowledge that the contractor was leaving any portion of the material on the street, so as to impede or make dangerous travel; a careful scrutiny of Schenk's testimony leaves this fact in doubt; but if he had knowledge as a lot owner, was that notice to the borough? Knowledge and notice are not necessarily and not always the same. Undoubtedly if any one had given notice to Schenk, councilman, of the character of the obstruction put upon the street by Kidd, so far as notice to one member of councils would affect the borough, there would have been notice. But whether, as a fact, he had knowledge, the jury was not instructed to find, and whether, as matter of law, such knowledge was notice to the borough, the court did not determine. So, practically, the point was not answered; was not affirmed.

The case in this particular, really went to the jury on the instructions in the general charge as follows: "The law assumes, that after a certain time they shall take notice of obstructions of such a character. That depends upon the circumstances of the case, to be sure, and how long the obstruction may remain upon the street, in order to charge the officers of the borough with notice. We refer you to the rule, hereinbefore laid down, with regard to the degree of diligence which the officers are to exercise according to the extent of the use of the street, and other facts which might bring knowledge home to them, and of which they should take notice." The same instruction, in substance, was given in the answer to defendant's second point, thus: "Though if you should conclude the particular pile of rubbish, on which the plaintiff was injured, had not been on the street over a day or two; if you find that others of a similar character had previously, from time to time, occupied substantially the same place, so that the one complained of was but a later one of a series of such obstructions, the municipality may be affected with notice, if, considering the extent of travel upon Jefferson street, the demands of the public thereon, and the period of time over which such obstruction extended,

and in view of the law already stated as to the duties of borough officers in this behalf, you think they should in the exercise of reasonable diligence, have known of the obstruction."

Considering the whole charge, on the question of notice, the case was clearly and correctly submitted to the jury. They were instructed that they might infer if, from the character of the obstruction, it was conspicuous or noticeable, and if it had been long continued, that the borough had notice of it.

But an affirmance of plaintiff's third point would have been error. Knowledge by a member of councils of a nuisance is not of itself notice to the borough; to so hold, would make the borough answerable for every individual violation of municipal law and ordinances by all its members. As this borough does seem to have had a street committee, commissioner of highways or other officers to whom was specially confided the duty of supervising the streets, that duty must necessarily be considered as resting with the borough council as a body; express notice given to anyone of these in his official capacity of a violation of borough law, would be notice to the body of which he was a member; but his knowledge and acts as an individual, are not notice to the municipality of which he is an official representative. Assuming each member to have been an agent of the borough in the supervision of its streets, and the knowledge of the agent to have been the knowledge of his principal, that knowledge must come to him in the course of the transaction of the business of his principal. Here, Schenk's knowledge, if he had such knowledge, came to him as an individual lot owner, engaged in the improvement of his lot; this had no relation to his official duty as councilman; he was performing no duty as a member of that body, but was in fact answerable to it for the manner in which he conducted his improvement as a lot owner. The council could have notified him to stop placing earth unnecessarily on the street, and leaving it there; could have had him arrested for the violation of the borough ordinances prohibiting such obstruction, if he persisted, and this because he was not in that particular business a councilman acting in his official capacity, but was acting as an individual lot owner in violation of the borough law. The case would have been otherwise had he, as councilman, been superintending and directing the excavation of a street or sidewalk for the borough under such circumstances; knowledge on his part would have been the knowledge of the principal. And while thus officially acting, he would not have been personally answerable to third par-

ties, but his principal would have been affected with notice of his acts within the scope of his authority, and would have been alone answerable. But in this case, his personal responsibility is wholly unimpaired, because his acts were unofficial. To say that because Schenk knew of the unsafe method, therefore his principal, the borough, knew, would compel us to go further and say, as the borough knew its agent, Schenk, was wrongfully obstructing the street, the agent is not answerable to the principal for any injury caused thereby; this would leave every member of councils free to adopt dangerous methods for the improvement of his own property, and at the same time leave the borough answerable to the general public for the damages consequent upon his acts; that is, the borough would become insurer of its officers against responsibility for individual wrongful acts.

While the court came dangerously near giving the erroneous instruction asked for, it did not in fact give it, and the jury went to their room controlled by the correct instructions in the general charge, and the answer to defendant's second point. Therefore, this assignment of error is not sustained.

The fourth and fifth assignments raise in effect the same question as the second, and require no further notice.

The sixth is to the refusal of prayer for peremptory instruction for defendant. The case was clearly one for the jury, and the court could not, without error, have withdrawn it from them.

All the assignments of error are overruled, and

The judgment is affirmed.

Court of Common Pleas No. 1.

EDWARDS v. COUNTY OF ALLEGHENY.

The Act of June 16, 1891, fixing the salary of the first assistant district attorney in certain counties does not apply to Allegheny county, as there is no act creating the office of first assistant in that county.

The office of assistant district attorney of Allegheny county is created specially by the Act of 1871, and his salary is \$1500 per year.

No. 224 March T., 1896. Case stated.

Opinion by COLLIER, J. Filed October 3, 1896.

We agree with the learned president judge of Common Pleas No. 2 (Judge EWING) when he said in *Commonwealth v. Grier*, 152 Pa. 176, that the assistant district attorney of this county was a salaried officer, made so by the Act of 1871, and his salary fixed at \$1,500 per annum. There never were any fees whatever attached to his office in any way and therefore we think this

case is ruled by the case of *Bell v. Allegheny County*, 149 Pa. 381.

Again, we further agree with the same learned judge in the same case that the "office of assistant district attorney in Allegheny county is an anomaly in the law of Pennsylvania. The office was created in fact for a special purpose and has been continued because it is difficult to repeal such an act."

It is the only office of the kind in the State that we know of. The section of the Act of 1867 defining his duties is as follows, viz: "It shall be the duty of said assistant district attorney to attend to all preliminary hearings in criminal cases in said county when the public interest may require; to prepare all bills of indictment for offenses cognizable in the courts having jurisdiction thereof, within said county, and to submit the same to the grand jury with the Commonwealth testimony and to affix to said bill of indictment the name of the district attorney, provided, that nothing herein contained shall interfere with the right of the district attorney to prefer a bill of indictment *ex officio* as heretofore, when proper occasion may arise."

It will be seen by this act that the officer is in no way dependent on the district attorney nor accountable to him nor can he be called on officially to assist him. The duties are specified in the act and he is made district attorney only in name.

Instead of being an assistant to the district attorney, helping him to try cases in court, which sits with two judges almost the entire year, he is an independent officer, having entire charge of the grand jury, preparing all bills, examining the witnesses, and has the remarkable power, by the act—and it is made his duty—to sign the name of the district attorney to each bill of indictment. All that is left by the act to the district attorney is his right to present a bill of indictment, *ex officio*, as heretofore.

Now, the plaintiff contends that he is entitled to a salary of \$4,000 per annum under the Act of 16th day of June, 1891, and that the words "first assistant district attorney" in said act apply to him. The words of the act are as follows, viz:

"* * * And all counties containing over 500,000 and less than 800,000 inhabitants the annual salaries of the county officers shall be as follows, namely: Of the district attorney, \$6,000; of the two assistant district attorneys, the first assistant, \$4,000, and the second assistant, \$2,500."

There is no Act of Assembly creating the offices of first and second district attorney and no act expressly authorizing their appointment.

We are of the opinion that the Act of 1891 has no application to the assistant district attorney created by the Act of 1867, and that he is not the "first assistant district attorney" contemplated by the said Act of 1891 and is not entitled to \$4,000 salary per annum, but to the salary fixed by the Act of 1871, viz., \$1,500.

And now, October 2, 1896, judgment is entered in favor of the plaintiff and against the defendant for \$1,375.

For plaintiff, *Watson & McCleave and G. W. Williams.*

For defendant, *W. B. Rodgers.*

Court of Common Pleas No. 3.

In re Voluntary Assignment of JAMES P. BAILEY
to WILLIAM J. SHAW.

An assignee in a statement to the assignor's creditors places certain stock in his hands at the value of \$3,000. It had been put at that value in the appraisal. Afterwards the stock is sold at public auction, but without sufficient notice, and knocked down for a nominal sum. The assignee should be surcharged the value of the stock.

No. 177 Nov. T., 1893. Exceptions to auditor's report.

Opinion by KENNEDY, P. J. Filed October 16, 1896.

When this matter was before the court upon exceptions to the original report of the auditor, after argument, the court deemed it advisable to recommit it to the auditor for the purpose of taking the testimony of J. P. Bailey and B. Donovan in explanation of the consideration for the judgment at No. 170 October Term, 1893. The testimony of these parties was taken by the auditor and a supplemental report thereon made by him. No new exceptions were filed to the supplemental report, but by consent the exceptions filed to the original report were treated also as exceptions to the supplemental report and a second argument was had thereon. At both arguments counsel for exceptants to the reports conceded that the second and fourth exceptions could not be sustained and must be dismissed by the court. The fifth exception was disposed of by the reference of the matter back to the auditor as before stated. The only exceptions insisted upon by counsel for exceptants in their arguments were the *first* and *third*.

As the third exception, viz., that relating to the surcharge of the accountant by the auditor of the amount of the judgment at No. 170 October Term, 1893, D. S. B., the auditor has found

that this judgment was collusive between the parties, of which collusion the assignee had sufficient notice to put him upon inquiry. The testimony taken upon the original hearing as well as that taken upon the reference of the matter back to him is quite sufficient to sustain the conclusion of the auditor that the assignee must be surcharged with the amount of the judgment, and we can find no reason for reversing him as sustaining this exception.

The only remaining exception to be considered is the first, and it is to the effect that the auditor erred in surcharging the assignee with an amount of loss in the sale of the capital stock of the "Allequippa Tin Plate Company." This stock was sold for a nominal sum by the assignee and his counsel claim it was worthless. A short time prior to the sale, Bailey and the assignee made an offer to the creditors of seventy-five per cent. upon their respective claims, accompanying which offer was a statement showing that they had in cash twenty-three hundred dollars, which had been handed back by Donovan after its reception by him on his judgment found to be collusive and this stock in the tin plate company, estimated in the statement at three thousand dollars along with other assets, as security for or as means of carrying out the offer. This offer was rejected, and shortly thereafter the stock was sold, at public auction, it is true, but there does not seem to have been reasonably proper notice of the sale, nor was there any conference with creditors with regard thereto, and the same was knocked down to Donovan on a bid which he at the time considered a joke.

Not long after the sale Bailey made another proposition to his creditors, viz., to give them a mortgage upon the property of the tin plate company in the sum of fifteen thousand dollars to secure their claims, and to this offer the assignee was also a party. Moreover, this stock was at the time of the assignment duly appraised at the sum of three thousand dollars, and the assignee in his account filed charged commissions on that amount as the value or the proceeds of the stock, which commissions he received.

Under the circumstances the assignee cannot now say the stock was worthless, and we think the auditor was right in surcharging therefor. This surcharge is modified and reduced by the auditor in his supplemental report, which modification and reduction we think correctly made. The exception is not sustained.

We are of opinion that all of the exceptions to the auditor's report must be dismissed, and that said report as modified by the supplemental

report and the schedule of distribution attached thereto should be confirmed absolutely.

For exceptants, *Donaldson Brothers*.

For creditors, *W. K. Jennings*.

Court of Common Pleas, BEAVER COUNTY.

LAIRD v. WACK.

The Act of June 2, 1881, which makes taxes a lien on real estate, having been declared unconstitutional, county taxes in Beaver county are not a lien on real estate and are not payable out of the proceeds of a sheriff's sale. The Act of May 22, 1895, providing for the divesting of tax liens does not of itself create a lien.

No. 331 June T., 1896. Case stated.

Opinion by WILSON, P. J. Filed September 7, 1896.

This is a case stated between Richard R. Laird, the plaintiff in the above stated judgment and *feri facias*, and C. C. Hazen, treasurer of Beaver county, to determine whether or not certain county taxes should not be first payable out of the funds in the hands of the sheriff, realized from the sale of the real estate of Ernestine Wack, after payment of the costs of sale. At the sale of the real estate of said Wack, defendant in the judgment and *feri facias* above stated, by the sheriff, on June 6, 1896, the proper notice was given as required by the Act of May 22, 1895, P. L. 111, that the county taxes, amounting to \$15.23, levied on January 1, 1896, against said real estate were unpaid.

The title of said act is, "An Act providing for the divestiture of liens of taxes levied or assessed against lands sold at judicial sales, and for the payment of the same out of the proceeds of such sale."

The first section of said act provides: "That the lien of all taxes now or hereafter to be levied or assessed against any real estate within this Commonwealth shall be divested by any judicial sale of such land: Provided, the amount of the purchase money shall equal the amount of the said taxes."

The language of the title and this section presume the existence of a lien. To divest a lien, one must first have been created. The title does not disclose any purpose of creating a lien; the purpose is the divestiture of a lien that is presumed to exist. The act in its entirety does not create a lien by express terms. The second section makes it the duty of certain officers to notify the sheriff of the amount, etc., of the taxes. It is general in its terms, but must be construed to embrace only those cases where tax liens are divested under the terms of the first section.

The act does not create a lien by implication. In *Burd v. Ramsey*, 9 S. & R. 109, Chief Justice GIBSON, disposing of a similar question, says: "If the Legislature had intended to create a lien, they would have provided some direct means of enforcing it, and the inference from the want of such a provision is irresistible. It is altogether incredible that they would have trusted to the uncertain event of the land being at some period sold by the sheriff * * * in which case only the lien would be available."

Taxes are not a lien upon seated lands, unless so made by statute. In *Burd v. Ramsey, supra*, it was decided that taxes against seated lands are not a lien against said lands, unless there is a statute declaring them to be such, but are merely a personal charge against the person of the owner or occupant. No statute created a lien for taxes against seated lands save the Act of June 2, 1881, P. L. 45, which made all taxes a first lien upon real estate from the date of the levy, provided for a tax lien record to be kept by the county commissioners, that the collectors should return all uncollected taxes by January 1, of the following year, and that the same should be recorded in said docket and remain a lien for two years from July 1 following, etc. This act, at the time of the passage of the Act of May 22, 1895, stood upon the statute books unassailed, and if it were in force to-day would give effect to the Act of 1895. The Act of June 2, 1881, P. L. 45, was declared unconstitutional on October 7, 1895, in an opinion by Justice WILLIAMS. When it fell, the Act of 1895 fell with it. It had no longer any office to perform.

In certain counties and municipalities, taxes have been made a lien by local legislation. This act might apply to such places if it did not violate the Constitution in so doing. Though general in its terms, in its operation it would be local. (See Art. IX, § 1, of the Constitution.) There being no local act creating tax liens in this county, that question does not arise; hence it is passed without further comment.

In looking about for the intention of the Legislature in passing the Act of May 22, 1895, it is not necessary to ascribe the attempt to divest liens that did not exist to want of information or knowledge upon the subject, but rather to the desire to protect purchasers at judicial sales from the payment of such taxes as were made first liens by the Act of June 2, 1881, *supra*; the reasons being apparent from the summary of the act given above and from the preamble of the act.

Now, September 7, 1896, the plaintiff, Richard R. Laird, is awarded a judgment for \$15.23, and the sheriff is directed to pay said Richard R. Laird the above sum, retained by him for the

payment of taxes, in compliance with notice as set out in case stated.

For appellant, *Frank H. Laird*.

For defendant, *Ellis N. Bigger*.

[See *Taylor v. Bowling*, ante, p. 103.]

Orphans' Court.

In re Estate of Rev. THOMAS CORCORAN, Dec'd.

An accountant who has paid preferred debts before notice of adverse claim of title to the funds in his hands is entitled credit; but adverse claimant may have reimbursement in subsequent distributions of funds of the estate in preference to unpaid creditors.

HAWKINS, P. J.

STATEMENT. Filed October 8, 1896.

The contest in this case turns on—

(1) Exceptants' claim of ownership of the proceeds of a note given by Father Luddon to Father Corcoran for four thousand dollars, with which accountant has charged himself; and

(2) Exceptants' denial of accountant's right to credit for payments made on account of decedent's preferred debts thereout.

The facts are these:—

(1) In May, 1894, Saint Agnes' R. C. Church building having been seriously injured by fire, the several insurance companies which had risks thereon paid Rt. Rev. Bishop Phelan, trustee, their respective shares at various times of the appraised damages, aggregating eleven thousand dollars; and this sum was thereupon turned over to Rev. Thomas Corcoran, rector of the church, who after restoring the building had a surplus of between four thousand and five thousand dollars, with which he proposed erecting a parsonage. Thus far there is no dispute. The question here arises as to what disposition was in fact made of the surplus. The exceptants claim that it was loaned to Rev. Luddon, and the note in question given; and this claim depends mainly upon the testimony of Miss McAleer and Mr. Howley. The former of these testified when first examined that Father Corcoran in the summer of 1894, in explanation of his inability to pay her salary, had loaned three thousand dollars to four thousand dollars of the insurance money out. The date at which this conversation was thus fixed was prior to the date of the loan; but Miss McAleer upon reflection was convinced she made a mistake which she asked leave to correct, and thereupon positively fixed the date of the conversation as the summer of 1895. This testimony it will be observed does not give the name of the person to whom the loan was made; but that of the following witness supplies this defect. Mr.

Howley, who was called without knowing the purpose, was on reflection clear in his recollection that Father Corcoran had told him in the summer of 1895 that he had loaned four thousand dollars of the surplus insurance money to Father Luddon. Both these witnesses were evidently intelligent and honest.

The note of Father Luddon, charged in the account, is dated December 28, 1894, and is in the name of Father Corcoran.

It is not alleged that there was any other note in existence; but it is claimed on behalf of the estate that this represents an investment of individual funds. When Father Corcoran became rector of St. Agnes' Church, he was said to have brought with him one thousand dollars. His salary as rector there was eight hundred dollars a year; and the perquisites amounted to about fifty dollars a month—sometimes more and sometimes less.

The rector had his residence and fuel free; but maintained at his own expense his household, and is said to have lived as well as any. He deposited his individual with the church funds in his own name. The aggregate amount of these deposits from October, 1885, until August, 1895, exceeded one hundred and fifty thousand dollars, of which about ten thousand dollars was deposited between the dates of the fires and the loan to Father Luddon. The congregation was said to have been one of the most liberal in the diocese. The probability is that a very small percentage of the deposits belonged to Father Corcoran. In 1890 and 1891, he loaned five thousand dollars by his check on the common depository. The money loaned to Father Luddon was also by check on the common depository. Not only the declaration of Father Corcoran himself but the probabilities go to show that these checks was answered by church funds. The court therefore finds from the evidence that the loan made by Father Corcoran to Father Luddon was made with funds arising from the policies of fire insurance belonging to St. Agnes' Church, whose trustee is the Rt. Rev. Bishop Phelan.

(2) As the preferred claims for which credit is claimed were paid by accountant before he had notice of adverse claim of title to the proceeds of Father Luddon's note, he ought to have temporary credit to the extent that they were paid out of this fund; but in the event further assets should come into the hands of accountant belonging to this estate, exceptants should be reimbursed thereout.

For claimant, *A. V. D. Watterson*.

For accountant, *J. S. & E. G. Ferguson* and *Mark Schmid*.

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No. 14.

PITTSBURGH, PA., OCTOBER 28, 1896.

Supreme Court, Penn'a.

IMBRIE, Executor of McCUNE, v. THE MANHATTAN LIFE INSURANCE CO.

A. takes out a life insurance policy in B. company and pays the first two premiums to the agent in notes. The agent has no authority to receive anything but cash in payment of the premiums. The B. company receives the notes from its agent in settlement of its account with him and notifies A. of the time when his third premium is due. A. dies before the third premium is due. *Held*, that it is a question for the jury whether the company accepted the notes as payment of the premiums.

Appeal of the Manhattan Life Insurance Company, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in favor of the plaintiff, A. M. Imbrie, executor of John D. McCune, deceased, in an action upon a policy of life insurance.

The facts, as they appeared on the trial before EWING, P. J., and the assignments of error, appear in the opinion of the Supreme Court, *infra*. Verdict and judgment for plaintiff. The defendant took this appeal.

For appellant, *Marcus A. Woodward* and *James Otis Hoyt*.

Contra, *James R. Macfarlane*.

Opinion by DEAN, J. Filed October 5, 1896.

The defendant company, on the 23d of January, 1893, issued to John McCune, of Wilkesburg, in Allegheny county, four policies of insurance on his life, each in the sum of \$5,000; the policies were known as life policies; for two years, the insured was to pay in advance, an annual premium of \$211.50 on each policy, and thereafter, on each an annual premium in advance of \$389, for eighteen years or the remainder of his life. This suit is upon only one of these policies; they were all solicited by James C. McKown, who at their date and for ten years previous, was the agent and general manager of the company for the Pittsburgh district. It was agreed between McKown and McCune, when the policies were taken, that the premiums on all four, for the first and second years should be paid in two notes of \$848, each to the order of McKown, one at five months and the other at six months. These notes were delivered by

McCune to McKown, who delivered to him the policies and receipts for the premiums. The notes not being paid in full when due, were renewed for the balance by McCune, and the old notes returned to him; two renewal notes were indorsed by McKown to third parties; a part of the amount was paid to the holders in his lifetime, and renewals had for the part unpaid. On 4th of January, 1895, before the expiration of the two years for which the premium had been paid in notes, McCune died. Due proofs of his death were made to the company, and claim made for payment of the policies, which was refused by the company on the ground, the premium had not been actually paid as required by the policies. McCune's executor then brought suits, of which this is one, on the four policies. On the trial of the cause, the facts as heretofore stated appeared and there was other evidence as to the authority of McKown as agent, and his course of dealing with policy holders, and the knowledge of, as well as ratification of, his acts by the company. The court submitted the evidence to the jury to find:

1. Whether the agent of the company had taken these notes as absolute payment of the premiums?

2. If not at the time taken in payment or if taken by the agent without authority, did the company, after full knowledge of the transaction, treat them as payment, and ratify the act of its agent?

The verdict was for plaintiff, and we have this appeal by defendant, assigning four errors.

The first is to the refusal of the court to peremptorily direct a verdict for defendant. As our ruling on the second, third and fourth assignments disposes of the first, we need give it no further attention. The last three raise the question as to the authority of the agent to accept notes when the policy is issued as actual payments of the premium, and whether if he had no precedent authority, there was subsequent ratification, and the effect of the evidence tending to prove ratification.

The plaintiff having offered the policies, premium receipts and preliminary proofs of death, the burden was on defendant to show the receipts were for notes instead of cash. For there can be no doubt the proper construction of the contract is that the insured shall pay the premiums in cash to the agent. And the acceptance of notes and delivery of the policy do not bind the company unless the agent had authority to waive a cash payment or his act was subsequently ratified by his principal. The written stipulation is: "No provision of this contract can be changed or waived except by a

written agreement signed by the president or secretary of the company."

While the evidence plainly showed the notes were given there was much evidence even on side of defendant, tending to show that whatever may have been McKown's authority, his acts in reference to this transaction were known to the company, and it by unequivocal conduct approved and ratified them. McKown was called by defendant and testified in substance that he accepted the notes from McCune in payment of his premiums and had delivered to him the policies; if the evidence had stopped here, there would have been just one question for determination. Had the agent authority to waive a cash payment? The contract or policy to which McCune was a party, and by which he was bound, answered no; then it would have been incumbent on plaintiff to show that outside the policy the company had conferred on him such authority, or if not authorized, the company had ratified the act. No precedent authority was shown; although requested to do so, the company did not produce its evidence, the written appointment of the agent showing his authority. But McKown goes further, and states, he sent the notes on to the company with many others; that afterwards, differences arose between him and the company, and Mr. Wemple, vice-president, came from New York to Pittsburgh to adjust his accounts, and brought these notes with others along; after a settlement, and a large balance struck against him as agent, Wemple took these notes with others in part payment of the balance; Wemple scrutinized all the notes, and selected such as were premium notes. When the notes were about to mature, they were sent on to Pittsburgh by the company for collection, and when presented bore the indorsement, "For collection on account of Manhattan Life Insurance Co., Wm. C. Frazee, secretary." Part of the aggregate amount of the notes was not paid, and the company returned them to McKown, charging him back with the amount unpaid. Then he took new notes from McCune for so much as remained unpaid. The testimony of the vice-president and secretary does not contradict these facts; they state, however, that the taking of the notes was an individual arrangement between McKown and McCune, not authorized by the company; that they accepted the notes from McKown only as collateral security for the balance due the company from him; that such entries on the company's books as this: "Due Co. Note, J. D. McCune," preceded by the number of his policy, was only a method of bookkeeping to accurately keep the account of the company with its agent.

While this may be so, the question was still for the jury. Did the company with full knowledge that the notes were given for premiums instead of cash, accept them as payment, and adopt precisely such course for their collection as if they were the owners of the notes? The credibility of the witnesses and the reasonable inferences to be drawn from the acts of the parties, were for the jury. McKown testified that as between him and McCune, he accepted them as payment; assume he had no authority to do so; if the company had knowledge of this violation of authority, took the notes from McKown in settlement of his balance, and looked alone to him for payment; gave no notice to the policy holder that they disclaimed the agent's authority, the jury might infer the company ratified his act in accepting the notes as payment. That part of the notes was not paid at time of McCune's death, is not important; were they accepted as cash, and the policies delivered in pursuance of that form of payment, is the question; he might have paid in greenbacks, and afterwards the Government might have refused to redeem its obligations; the company might have accepted iron at so much per ton as cash, and afterwards have failed to sell for one-half the value at which they had taken it. There is a form of contract with reference to notes accepted as premiums, which in some of the cases the courts have enforced; that is where the notes on their face stipulated that if not paid when due the policy shall be void. But that is not this case.

Another significant fact tending to show the company ratified the act of the agent in accepting these notes as absolute payment, is the notice as to the third annual premium; that was due the 23d of January, 1895; McCune died 4th of January, nineteen days before it was due; but in December, 1894, about thirty days before it was due, the company sent him formal notice to pay this premium on that day, or his policies would be void. At that date with full knowledge that notes had been received for the first two years' premium, had been in the company's possession, part of them paid and part not paid, the insured is notified to pay the premium for the third year, or his policy will be avoided; if McCune had lived until the 23d of January and had paid the premium, that fact alone, under the authorities, would have effectually estopped the company from denying the actual payment of the first premiums. But what is the reasonable inference to be drawn from the notice? Is it not that the policies are now valid, the first two years' premium having been paid, but they will not continue to be so if the third premium

be not paid? Not having lived to pay the third year's premium, is not the present defense an afterthought suggested by an otherwise immediate liability for the face of the policies?

We do not see how the learned judge of the court below, on all the evidence, could have withheld this case from the jury, as urged by counsel for appellant. There were one or two inadvertent misstatements of fact as to date, and one in treating the testimony of one witness as that of another, but these trifling errors could have had no possible influence on the verdict. As to the complaint that the charge was partial and an argument to the jury in favor of plaintiff, it is not well founded. A bare statement of the undisputed facts in this case, is itself an argument against defendant's position, that McKown's conduct was not recognized or approved by it; and if defendant failed to rebut the inferences warranted by the facts, that was not the fault of the judge, who seems to have fairly submitted the case. It is unfortunate for this defendant that its policy-holder died when he had only paid two years' premium on \$20,000 insurance, but it is generally supposed that is a risk life insurance companies take. If policy-holders all lived until the annual premiums equalled the amount of the policies, there would be no risk assumed.

We see nothing in any of the assignments of error warranting a reversal of the judgment; therefore it is affirmed.

[A motion for reargument was refused.]

NATIONAL BANK OF THE REPUBLIC v. ROCHESTER TUMBLER CO. et al.

A corporation is not estopped from asserting a lien on stock for a debt due it, as against a transferee thereof, by the fact that the certificate states that the shares are "transferable personally or by attorney on the books of the company," without any reference to such alien.

An employer may trust his employee to the extent of negligence without impairing his rights against the employee, or giving the employee's creditor any ground of complaint, if the employer has no notice of such creditor's rights.

Act 1874, § 7, makes certificates of stock in corporations formed under the act transferable at the pleasure of the holder, "subject, however, to all the payments due or to become due thereon," but provides that "no certificate shall be so transferred so long as the holder thereof is indebted to said company unless the board of directors shall consent thereto." Held, that the indebtedness referred to in the last clause is not restricted to that growing out of the original subscription and subsequent calls and assessments.

Appeal of National Bank of the Republic of New York, plaintiff, from the decree of the Court of Common Pleas No. 1, of Allegheny county, on bill in equity filed against the Ro-

chester Tumbler Company and others to compel such company to permit a transfer of certain stock upon its books.

For appellant, *Brown & Lambie, Watson & McCleave* and *H. Aplington*.

Contra, Knox & Reed.

Opinion by MITCHELL, J. Filed January 6, 1896.

The claim that the defendant is estopped by the form of the certificate, which sets out that the shares are "transferable personally or by attorney on the books of the company," without any reference to a lien for the stockholder's indebtedness, cannot be sustained. The language of the certificate is not a representation of any inherent quality of the shares or rights of the holder, but is merely information as to the mode of transfer. From the nature of the business, transfers must be under some regulation; and where, as in this case, the regulations are imposed by the statute, which is the fountain of the corporate power, all parties are bound to take notice of them. The Pennsylvania cases cited are not in point. *Willis v. Railroad Co.*, 6 W. N. C. 461, and *Kisterbock's Appeal*, 127 Pa. 601, decided that, as the issue of certificates was an act within the lawful powers of the corporation, and depended on facts not accessible to outside parties, the latter were entitled to rely upon them as evidence of title to shares, and, as against a purchaser for value, the company would be estopped. There was no question of the mode or conditions of transfer. *Wood's Appeal*, 92 Pa. 379, and *Jeane's Appeal*, 116 Id. 573, were cases of private owners who had clothed their agents with apparent authority to transfer, and were held to be estopped thereby. On the other hand, an authoritative case on this question is *Hammond v. Hastings*, 184 U. S. 401, where the exact point was ruled in accordance with the views we have expressed.

2. Nor can the claim be sustained that the defendant has lost its right to lien, as against the appellant, by reason of negligence in allowing the debt to be created. There is no obligation on a creditor to take care of other creditors of the mutual debtor, further than by the avoidance of fraud. An employer may trust his employee to the extent of negligence without impairing his rights against the employee, or giving the employee's creditor any ground of complaint, before notice of such creditor's rights. And even after notice it does not follow that he must sacrifice his own rights. In the present case, it is doubtful if the learned master did not go too far in favor of the appellant in

holding that knowledge by the president and directors of the treasurer's misconduct raised any duty to outside parties to discharge him, or in any way impair the right of lien even for a subsequent increase of his debt. Such is not the rule, even in favor of sureties: *Railway Co. v. Shaeffer*, 59 Pa. 350. The directors, being suddenly confronted with knowledge that their treasurer had by outside speculation with the company's money, become a defaulter, had to decide whether it was for the interest of the company to allow him time and opportunity to withdraw gradually from the illegal ventures, and reduce his debt, or to stop him peremptorily at all risks. In reaching a decision they were not necessarily bound to take notice of danger to his other creditors, or to prefer such interests to their own. Those are matters which must depend on the particular circumstances of each case. It is not, however, necessary to go into this inquiry, since it is conceded that the debt of Lippincott to the appellee, incurred before knowledge of his misconduct, or of appellant's claim, very far exceeds the value of the shares in controversy.

3. The main question is the extent of the lien given by the Act of 1874, P. L. 78, and this depends upon the meaning of the word "indebted" in the seventh section. The section provides for certificates to be issued to the holders of stock, according to the number of shares held, which certificates "shall be transferable at the pleasure of the holder, in person or by attorney; * * * subject, however, to all the payments due or to become due thereon; and the assignee * * * shall be a member of said corporation and have * * * all the immunities, privileges and franchises, and be subject to all the liabilities, conditions and penalties incident thereto, in the same manner the original subscriber or holder would have been, but no certificate shall be transferred so long as the holder thereof is indebted to said company unless the board of directors shall consent thereto." P. L. 78. The last clause is the operative one, from which the lien in this case arises. On its face, and by the natural meaning of the words, it includes all kinds of indebtedness. Standing alone, there could be no question about it. But appellant contends that it should be read with and controlled by the previous expression, "subject to all payments due or to become due thereon," and its meaning, therefore, restricted to indebtedness growing out of the original subscription, and subsequent calls or assessments thereon.

The argument is ingenious, but not convincing. It is opposed, not only, as already said, to

the natural meaning of the words used, but also to the words which would most naturally have been used if the intent had been as claimed. The prior part of the section makes the certificates transferable at the pleasure of the holder, and the transferee takes them subject to all payments and liabilities incident to the original subscription. If the indebtedness which would prevent a transfer without the consent of the directors had been intended to be only that arising from the same source, the easiest and most obvious mode of expression would have been to add to the first clause "and subject, further, as to all payments due thereon, to the consent of directors," or to have substituted for the last clause, "but no certificate shall be transferred so long as any payments remain due thereon," unless the directors consent, etc. Either of these forms would have expressed clearly and definitely the restriction of the kind of debt which would prevent transfer, and one of them or some other similar phrase, would have been the natural expression chosen for such idea. But, instead of using any such expression, the Legislature indicated its intent by the broad word "indebted." The fact is, as was pointed out by the learned master, that the two clauses, as they stand in the act, do not refer at all to the same thing. The first, "subject to all payments due or to become due thereon," refers to the obligations to be assumed by the new taker, while the other, "so long as the holder is indebted," refers to the existing obligations of the former owner. A stockholder may become indebted to his company in many other ways than for calls upon his subscription, and the company may be content with his ability to pay, and its hold upon his shares as security. But this security would be lost if he could step out at any time by the transfer of his shares with only a liability for calls upon the original subscription. The Legislature clearly had these considerations in view when it drew the distinction between the new obligations of the transferee and the old ones of the transferor, and described the latter by the broad word "indebted."

But there is another section in the act which makes this conclusion irresistible. If the indebtedness which gives a lien is only such as arises from "payments due" on the stock, then a stockholder not so indebted can, as the language of the first part says, transfer at his pleasure, and the consent of the directors need only be obtained when he is so indebted. But, by section 12, "no shares shall be transferable until all previous calls thereon shall have been fully paid in." That is, if the present holder is not indebted on calls, the consent of the di-

rectors to a transfer is not necessary, and if he is so indebted the directors have no power to consent; so that, in either alternative, the prohibition against transfer without consent of the directors becomes ineffective, and the clause without meaning. A construction which leads to such results cannot be entertained.

Where the legislative intent is clear from the words used, it is idle to discuss the agreement or variance of such intent from previous legislative policy. But, as the subject has been somewhat elaborated in the argument, it may be well briefly to call attention to the trend of legislation in this State towards the gradual assimilation of rights and duties between members of partnerships and of corporations. The statutory authorization of special, and later of limited, partnerships has approximated the status of the members to that of mere stockholders, in that they may invest a definite amount of capital and avoid the unlimited common-law liabilities. On the other hand, when a partner sells out, either voluntarily or involuntarily, he passes to his vendee only a right to an account, and he cannot at any time, unless by consent, withdraw from the firm, and leave the others to pay its debts; and in this respect the Legislature has passed many acts, including the one under present consideration, tending to put a stockholder desirous of withdrawing in an analogous position by requiring him first to pay up his indebtedness to the corporation. A number of such acts are cited in the argument of the appellee, and need not be enlarged upon here, further than to say that they have uniformly received from this court a construction in furtherance of their intent, and in harmony with the view we have expressed of the Act of 1874. See *Rodgers v. Bank*, 12 S. & R. 77; *Grant v. Bank*, 15 Id. 140; *Sewall v. Bank*, 17 Id. 284; *Bank v. Earp*, 4 Rawle, 384; *Railroad Co. v. Clarke*, 29 Pa. 146; *Bank v. Armstrong*, 40 Id. 278; *Klopp v. Bank*, 48 Id. 88; *Mount Holly Paper Co.'s Appeal*, 99 Id. 513; *Reading Trust Co. v. Reading Iron Works*, 137 Id. 282.

Decree affirmed at the costs of appellant.

Superior Court, Penn'a.

CHRISTNER v. JOHN.

Where notwithstanding a misdirection, goods are actually delivered to the person, and at the place ordered, there is no legal reason why either the plaintiff or the defendant should suffer loss, and therefore no room for the application of the maxim that the loss which must fall on one of two innocent persons must be borne by him whose accident or mistake was the cause of it.

The question whether there was a mutual mistake of fact in an alleged settlement is one for the jury.

Where the record shows neither an exception to the charge of the court, nor that the copy filed was approved by the judge, or filed by his direction, the appellee is entitled to have the case disposed of upon the record as it stands at the time the appeal is heard. The record cannot be supplied by a general rule of court, or a general practice of the judge to direct exceptions to be noted for both parties.

Appeal of H. F. John, defendant, from the judgment of the Court of Common Pleas of Somerset county, in an action by Herman Christner, to recover for certain lumber sold and delivered.

The facts are stated in the charge of the court as follows:

"The plaintiff has brought this action to recover from the defendant the price of a carload of white oak lumber. There are a number of facts connected with the case which are not at all disputed. In the first place, the defendant, on the 14th day of June, 1889, gave to the plaintiff an order which reads as follows: 'Please cut and ship soon as possible to Coke Company of Connellsville, end track, Lelsenring, Pa., 70 pieces, 10 by 10 by 12, (meaning 10 inches square and 12 feet long) oak, to be good, solid white oak. Hurry up and get this off soon as you can, and oblige, truly, A. F. John.'

"In pursuance of that order the plaintiff prepared the lumber designated in it and placed it upon a car of the Baltimore & Ohio Railroad, at Pine Grove station, in this county. It seems the plaintiff's son attended to the shipment of the lumber, and he made a mistake in the direction which he gave for its shipment. A card was offered in evidence which, it seems, the son filled with the shipping directions, and instead of the directions placed thereon being to the 'Coke Company of Connellsville, end of track, Lelsenring, Pa.,' it was written to the 'Connellsville Coke Company, Lelsenring, Pa.' Thus far the parties are agreed. There is no question about these facts, plaintiff does not deny that the error was made in the name of the company and the particulars with regard to the point of destination.

"Now, the defendant not having paid the plaintiff for that car load of lumber, this suit is brought to enforce its payment, and the defense is set up that by reason of the misdirection in the shipping of the car the carload of lumber was lost to the defendant and he never procured pay for it from the parties to whom it was to be sent. So that it becomes an important inquiry to ascertain whether or not the carload of lumber reached the parties to whom it was intended to go and had been sold by Mr. John. The cor-

rect corporate name of the purchaser seems to be the 'Coke Company of Connellsville,' and its place of business at the time was at the end of the track near Leisenring, and not Leisenring station, but near by. The end of the tract at that time, it seems, extended some little distance beyond the station.

The defendant says the coke company refused to pay for the lumber, alleging they had never received it; and it is said, in answer to plaintiff's claim in this case, that the lumber failed to reach its destination, and so was lost, in consequence of the car being misdirected, as we have stated to you.

"Now, how is that fact? As we have already remarked, the plaintiff does not for a moment deny that there was an error in writing the shipping directions on the card which was placed upon the car. The card did name Leisenring, Pa., as the point of destination; and for all the purposes of the common carrier, of the railroad company, that would carry the car to Leisenring. Did it interfere with the consignment reaching the particular point to which it was to go, namely, to the 'End of Tract, Leisenring;' and did the fact that the name of the consignee was incorrectly given as 'The Connellsville Coke Company' instead of 'The Coke Company of Connellsville,' interfere with the consignment reaching the party for whom it was intended? This is the important inquiry in this case.

"The car was No. 4105 and it contained seventy pieces of prepared lumber 10 by 10 inches, 12 feet long, of white oak. Now, Mr. John, the defendant, as we have stated, says the consignee denied receiving the lumber and refused to pay, and he never has paid, and that he so informed Mr. Christner, the plaintiff; and that in pursuance of that understanding the credit which had been already entered on Mr. John's books in favor of Mr. Christner, was changed, charging back to him the price of this lumber which it was alleged had been lost through his negligence or that of his son in shipping the lumber; and that that was at the time understood by both and fixed and agreed upon between them. Mr. John has also placed on the stand a gentleman by the name of Randolph, who says he was the general superintendent of the Coke Company of Connellsville, the consignee of this lumber, and he undertakes to say that the lumber was never delivered and that they never paid for it. And the reason which he assigns for not paying is that, in the first place, they could never find any trace of the lumber having reached its destination, and principally because of the misdirection in shipping, this company refused to pay and has not paid Mr. John for the lumber.

"On the other hand, the plaintiff has called to the witness stand the freight conductor who had charge of the train that carried car No. 4105 from Connellsville to Leisenring on the 28th of July and again brought it back on the 30th of July, we believe it was, empty. And this is for the purpose of showing to you that the car thus loaded with lumber was a fact delivered at Leisenring or thereabouts. And that is where the principal conflict in the testimony arises, because there is little doubt that the car went to Leisenring. Did it go to the particular point intended? You will recollect the testimony of Mr. Snyder. It has been very fully discussed, and I will not undertake to repeat what he said as to the particular point of its delivery, you will recall that, and whether the Coke Company of Connellsville received that car of lumber notwithstanding it was directed to the Connellsville Coke Company and was not directed to the End of Tract, Leisenring.

"The plaintiff also calls upon the witness stand a man by the name of McLaughlin, who testified that he was a carpenter employed by the Coke Company of Connellsville, and that he had used in the construction of some work connected with a shaft of that company lumber corresponding in measurement with that shipped by Mr. Christner, namely, seventy pieces, 10 by 10, and 12 feet long.

"Now, the defendant in rebuttal, however, offers testimony of a shipment made by himself from Sand Patch on the 9th of July, we think it was, of a carload of lumber containing also seventy pieces of oak, 10 by 10 and 12 feet long, and it is argued from that that the lumber used by McLaughlin may have been that lumber, and that the lumber used on the ground does not necessarily prove that it was the lumber shipped from Pine Grove but may have been that from Sand Patch.

"[Now you must determine from all the evidence submitted whether or not the carload of lumber shipped from Pine Grove by the plaintiff reached its destination and was received by the Coke Company of Connellsville. Our instructions are, if it did in fact go into the hands of the parties for whom it was intended, if it was delivered to the proper consignee, notwithstanding there was a misdirection upon the car, the error would be immaterial, it worked no harm if notwithstanding the error, the lumber was received by the parties to whom Mr. John had sold it, if it reached them. As a matter of course, if in consequence of a misdirection, a mistake made by the plaintiff, the lumber was lost to Mr. John and the Coke Company of Connellsville, then that mistake would defeat

the plaintiff's right to recover. Because, if through his own blunder it was lost, he could not ask an innocent person to suffer. So the question comes back to this, whether, notwithstanding the misdirection, the lumber was delivered to the proper party, is the main question.]

"Now, it has been also stated that afterwards the accounts of the plaintiff and defendant were settled, after the lumber had been credited to the plaintiff, and it was said by the consignee that it was not received and they refused payment, and the amount was then charged back to Christner and thereafter a settlement was had showing fifty-one cents coming to the defendant, and the plaintiff paid that. Plaintiff, however, says that was done under a mutual mistake, that the understanding was that the lumber had not been delivered to the consignee. He says now, however, it was not lost and it was a mistake and he should have been paid, and he asks that he be now paid. [We say to you, if such an arrangement was made under the mistaken idea of the parties that the lumber was lost when in fact it was not lost, the circumstance that the plaintiff paid the fifty-one cents on balance of the account, and also showed that though he had been credited with the lumber and it was charged back to him, that cannot defeat the action.]

"It was also shown that thereafter other transactions took place between the parties and a check of \$215.13 was given to the plaintiff, having the words in full up to date. If that related to other transactions and did not involve the price of a carload of lumber, the fact that he received that check in full up to date would not defeat a recovery, because it would be construed as in full of the amount which showed that balance.

"We have been requested to charge you on behalf of the plaintiff as follows:

"If the jury believe that the defendant ordered a carload of lumber from the plaintiff, to be shipped to the Coke Company of Connellsville, end of track, Leisenring—that the car was shipped to Connellsville Coke Company, Leisenring, Pa., but in fact was delivered to the Coke Company of Connellsville end of track, Leisenring, Pa., then the plaintiff is entitled to recover and their verdict must be for the plaintiff. *Answer.*—That point is affirmed.

"The defendant presents these points for our instructions:

"1. Under all the evidence in the case the verdict must be for the defendant. *Answer.*—We decline to so charge you. The point is refused. It depends upon how you may find the fact of

delivery of the lumber, and other facts to which we have already adverted.

"2. As the plaintiff has proved that he did not follow the instructions given him by the defendant with regard to shipping the carload of lumber in dispute, and as the undisputed evidence is that the defendant did not receive pay for the lumber because of misdirection in shipping, therefore the verdict must be for the defendant.

"*Answer.*—The shipping address was only for the purpose of furnishing directions to the carrying company so as to enable it to find the consignees, to find out the proper destination. If, notwithstanding the error of the address on the shipping card, the car went to its intended destination, arrived safely where it should go, the error was harmless and did not afford a shadow of ground to the consignee, the Coke Company of Connellsville, to refuse payment, because, as we have said, its only purpose was to lead the consignment to the Coke Company of Connellsville, and when it got there, if it did, the proper address could have accomplished no more; but if through the mistaken address the car was carried elsewhere and the price of the lumber was thus lost through the mistake of the shipper, the plaintiff cannot recover.

"The plaintiff has upon him the burden of proof, and it being conceded that a mistake was made by him in the shipping directions, the burden is upon him to show that the lumber reached its proper destination; we must show that by a preponderance of evidence. Your verdict, if for the plaintiff, will be for such amount as the carload of lumber was sold at by Mr. Christner to Mr. John. We do not recall any evidence in the trial of the case fixing the value, we do not recall any testimony fixing either the value of the lumber or the price at which it was sold by Christner to John. We must leave that to you."

Mr. Ruppel.—"There was no testimony as to that."

The Court.—"Rather than have a mistrial on account of such oversight, we will reopen the case right here."

Mr. Ruppel.—"Your Honor may charge that we concede the price to have been \$84."

"As we have just stated, there was no proof in the present trial of the price agreed upon between the parties when the lumber was ordered, but counsel now concede that the price was \$84. So, if you find for the plaintiff, it will be for that amount; and if that is the price of the lumber, then the plaintiff, if entitled to recover, would be entitled to recover interest also from the time when it was to have been paid. If you find for

the defendant, your verdict would be simply for the defendant. The costs would follow the verdict."

Verdict for plaintiff \$106.12 and judgment thereon. The defendant took this appeal, and assigned as error those parts of the charge enclosed in brackets, and the refusal of the points submitted by him.

For appellant, *Coffroth & Ruppel*.

Contra, *F. J. Kooser, Kooser, Scott, Ogle and Valentine Hay*.

Opinion by RICE, P. J. Filed July 16, 1896.

We think the learned judge below took an entirely correct view of this case, when he said, that the main question was, whether, notwithstanding the misdirection, the lumber was delivered to the proper party. Upon the facts supposed in the instructions, which are the subject of the first assignment of error, and in the plaintiff's point, the affirmance of which is the subject of the second assignment of error, the plaintiff's mistake in directing the consignment to "The Connellsville Coke Company, Leisenring, Pa.," instead of to "The Coke Company of Connellsville, end of track, Leisenring, Pa." was harmless. Upon these facts the defendant could recover from the Coke Company of Connellsville, and there is no reason why, upon the same facts, the plaintiff should not be permitted to recover from the defendant. It is suggested in the appellant's history of the case and brief of argument, that the Coke Company of Connellsville has become a distinct corporation and therefore the claim is uncollectable; also, that on a former trial of this case, in which a verdict was rendered for the defendant, the plaintiff produced no evidence to show that the lumber had been actually received by the above mentioned company.

It is not clear how these facts would affect the question of the defendant's liability to the plaintiff, except, possibly, because they would furnish a reason for not going behind the alleged settlement between them. But be that as it may, it is sufficient to say without discussing their relevancy that they are not shown by the record of the evidence before us. We have no means of knowing what was proved on the former trial or what were the reasons for granting a new trial, and we have looked through the evidence in vain for proof that the Connellsville Coke Company of Connellsville is a defunct or an insolvent corporation. Taking the record as it is presented to us, it seems too plain for argument, that if the lumber was actually delivered to the person and at the place ordered there is no legal reason why either the plaintiff or the

defendant should suffer loss, and therefore no room for the application of the maxim that the loss which must fall on one of two innocent persons must be borne by him whose accident or mistake was the cause of it.

The third assignment of error raises a question as to the sufficiency of the evidence of an actual delivery of the lumber to the person and at the place ordered. The question is not what conclusions we would have reached if it were our province to find the facts, but whether there was evidence from which a jury might find the fact. As it was our duty to do we have carefully examined the evidence with reference to this question, and are of opinion that there was more than a mere *scintilla* and therefore it would have been error for the court to take the case from the jury.

In the absence of proof that the carload of lumber was actually delivered to the Coke Company of Connellsville, the defendant's second point might have been well taken. But if the company actually received the lumber, how could the misdirection be set up by it as a reason for not paying? As the learned judge well says, in that case the mistake was harmless, and did not afford a shadow of ground to the consignee to refuse payment. His answer to the point was full, clear and accurate, and we can add nothing in vindication of its correctness.

Undoubtedly, as the appellant's counsel argue, the parties had a right to adjust their own disputes, and any settlement that they made with knowledge of the fact would bind them. But a settlement of their accounts, whereby the price of the carload of lumber was charged back to the plaintiff, under the mistaken belief of both parties that it had been lost, when in fact it had not been, but had gone to its proper destination, ought not to defeat the action. The question whether there was such mutual mistake in the alleged settlement was one for the jury, and was properly submitted.

All of the assignments of error relate to the charge of the court, and might have been dismissed upon the ground that when the appeal was heard, the record showed neither an exception to the charge of the court, nor that the copy filed was approved by the judge or filed by his direction. The place of these cannot be supplied by a general rule of court, or a general practice of the judge to direct exceptions to be noted for both parties: *Commonwealth v. Arnold* 161 Pa. 320; *Pool v. White*, 171 *Id.* 500. The practice referred to is evidently followed by the judge in order to prevent the consequences of the possible forgetfulness or oversight of counsel, but we question whether as a matter of gen-

eral practice he should assume the responsibility of noting exceptions to his charge or to his other rulings, unless he is expressly requested so to do. After the case was argued before us, a certificate of the judge was filed, setting forth that "it having come to the knowledge of the court, that the record does not show that an exception was noted at the time of the trial to the charge of the court, and the impression of the court being that the stenographer was directed at the time to note an exception to the charge, to counsel for both parties, and from the further fact that the court has been in a uniform habit of directing the stenographer to note exceptions to persons on both sides at the close of his charges, the court now orders and directs that an exception to the charge as filed, as it now appears in the paper book in the case now pending in the Superior Court be noted to the counsel for defendant and a bill sealed *nunc pro tunc*.

We do not question the authority of the court to correct the record in accordance with the fact, and if, as a matter of fact, an exception was taken at the trial, which by mistake was not noted, it was proper for the court to direct it to be done *nunc pro tunc*. But according to strict practice, the appellee was entitled to have the case disposed of in this court, upon the record as it stood at the time the appeal was heard; especially was this so in this case, because the appellant had notice of the alleged defect in the record, and ample opportunity to have it corrected long before the appeal came on for argument. But we will not press that objection to a consideration of the assignments of error as we find nothing in them calling for reversal.

The judgment is affirmed.

Court of Common Pleas, NORTHUMBERLAND COUNTY.

In re NATURALIZATION.

Every applicant for naturalization should know the principles of the Constitution and the government, should be able to talk English intelligently and write his own name.

No law imposes on State courts the duty of naturalization. The State courts act only as a matter of accommodation.

In re naturalization of citizens.

Opinion by SAVIDGE, P. J. Filed September 19, 1896.

Friday, September 25, 1896, at 9 o'clock A. M., is fixed for the hearing of applications for naturalization. There was a change of policy several months ago, and it is fitting there should be a brief statement of what will be required of all applicants, so that those knowing themselves

not qualified may be saved the expense of appearing at Sunbury with their witnesses.

No person will be naturalized who has not a general familiarity with the Federal Constitution and with our method of government, State and national. The Act of Congress requires each applicant to take an oath that he is attached to the principles of the Constitution. No applicant will be permitted to so swear unless he knows what those principles are. Each applicant must be able to, at least, write his name and read sufficient English to intelligently make up his own ballot. There is already sufficient ignorance and venality at the mercy of the unscrupulous, petty politician. Each applicant shall show a general knowledge of the government, customs, history and geography of the nation to which he is now subject, and of the customs, history and geography of the United States; otherwise, he is not fitted to make choice between the two sovereignties. No person who cannot make intelligent choice is fitted to cast off one allegiance and take on another. In short, no one will be naturalized who does not have the general intelligence of the average school boy who has passed through our public schools. One of the chief purposes of our common school system, with which we have taken so much pains and upon which we expend vast sums of money, is to fit our young men for intelligent citizenship. Why should this good work be neutralized and set at naught by an indiscriminate naturalization? The fact that we have great numbers of ignorant, corrupt and criminal American-born citizens is no answer. Their influence is for evil and not for good. We are not proud of them. The situation will not be improved by adding to their number.

No law imposes upon State courts the duty of passing upon applications for naturalization. This belongs legitimately to the Federal courts. It is only where the latter are inconvenient that the State courts act, and then only as an accommodation. This court will gladly continue to accommodate all persons qualified for citizenship. I believe moral and intelligent foreigners ought at all times be freely admitted to citizenship. As a rule, they make patriotic citizens. Numbers of them are among the best. These are equally interested with the American-born that a moderately high standard of intelligence and morality should be required. Obviously there ought to be required of each applicant an intelligent comprehension of his duties as a citizen. Satisfactory proof of moral character, sobriety and general good behavior will be required.

It is a deplorable fact that much of the immigration coming to this country, especially to the anthracite coal region of Pennsylvania, of recent years, is of the worst type. It does not begin to favorably compare with what we used to have. The idea of a great mass of those who have recently come seems to be that liberty in America means free license for drunken debauchery and riotous conduct, to fight, shoot, stab and commit lawless brutality with impunity. Sufficient proof of this will be found in the records of our criminal courts. Under present conditions, it will not do to issue certificates by the wholesale for the mere asking. Citizenship is becoming too cheap. Thoughtful citizens of all nationalities realize that it is time to call a halt. Out of a total of more than sixty applications offered within three months past, eight only have been granted certificates. None of the others presented sufficient evidence of fitness to warrant the court in naturalizing them. It is to be hoped that, in due time, a majority of those not now acceptable may qualify themselves. It could be hoped that, in the meantime, Congress would evince sufficient courage and wisdom to restrict immigration, so that none but those morally and intellectually qualified for citizenship at the time would be admitted, we might look forward to a better condition of affairs.

For the welfare, not only of the American-born, but of all people of every nationality now here, this ought to be done. I am of opinion that nowhere would such action be more heartily welcomed than among the well-meaning and right-thinking people of foreign birth. They have a lively appreciation of the condition of the masses in Europe. They are quick to realize what must be apparent to everybody (except, perhaps, Congress), that, unless there is restriction of immigration, the labor of America and the labor of Europe is bound to come to the same common level. They know that every new influx of immigrants takes something from their chances of profitable employment. It seems a pity our legislators will not give the foreign vote credit with sufficient intelligence to know what is best for it in so plain a matter.

Orphans' Court.

In re Estate of JOHN KERR, Deceased.

Where one of a residuary estate is set apart to the widow for life and then the payment of a special legacy thereout, and the other two-thirds is made presently payable to next of kin, refusal by the widow to take will not make the special legacy payable out of the latter fund.

Exceptions to adjudication of audit.

Opinion by HAWKINS, P. J. Filed October 3, 1896.

If the right of Robert P. Kerr to present payment of his legacy had been questioned at the audit, a different decree must have been made. He is plainly not entitled to acceleration of payment. There is no fund presently available for that purpose. The will practically divides the residuary estate into two independent parts with a different scheme of distribution for each: two-thirds are made presently distributable amongst the next of kin; and the remaining third is set apart,—

(1) For the use of the widow during life;

(2) On her death for the payment of Robert P. Kerr's legacy; and

(3) Distribution of the surplus amongst the next of kin.

Unlike the case of *Frith v. Denny*, 2 Allen, 468, which appears to have been disapproved in *Vance's Appeal*, 141 Pa. 210, the residuary relation of the next of kin here to Robert P. Kerr was special in its character. There was a present distribution contemplated which necessarily implied a vested right in the next of kin to two-thirds of the estate; and a restriction of Robert P. Kerr to the remaining third as the source of payment of his legacy. The refusal of the widow to take under the will did him no injury; there will still be funds freed by the widow's refusal available for the payment of his legacy in accordance with the testator's expressed intent. In either event he would have no reason to complain; he would get exactly what testator said he should have: *Young's Appeal*, 108 Pa. 17; and he has no apparent equity to more. The only parties who were injured by the widow's refusal to take were the next of kin; for instead of receiving the two-thirds which the will said they should have, they can receive presently in distribution only half of the estate. To postpone them to Robert P. Kerr would not be in furtherance of any direction in the will; but in direct violation of the testator's intent, and the equity of exceptants.

The cases of *Vance's Appeal*, *supra*, and *Ferguson's Appeal*, 138 Pa. 408, cited on behalf of Robert P. Kerr, are plainly distinguishable from the present, by the gift of the whole estate to the widow for life, followed by a general residuary disposition to take effect at her death.

It follows that the decree made in acceleration of payment of his legacy must be vacated and set aside. The fund belongs and is presently distributable to the next of kin.

For residuary legatees, *Wm. C. Gull*.

Contra, *John D. Shafer*.

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PITTSBURGH, PA., NOVEMBER 4, 1896.

Supreme Court, Penn'a.**JOHNSTON et al. v. CALLERY.**

A survey on the ground made by a company invested with the power of eminent domain, followed by selection and proper adoption of a line for the proposed road, fastens a burden upon the property sufficient to relieve a vendee from his contract to purchase free of encumbrances.

All unequivocal traverses or denials of material allegations in support of the claim, and all material allegations of fact contained in affidavits of defense, must be accepted as verity.

Appeal of Anna D. Johnston, Harvey Childs, Jr., and William E. Littleton, executors and trustees of the estate of Ross Johnston, deceased, and Mary E. Sloan, plaintiffs, from an order of the Court of Common Pleas No. 3, of Allegheny county, in an action of *assumpsit* brought against James D. Callery, for the price of land.

Rule for judgment for want of a sufficient affidavit of defense.

For appellants, *Knox & Reed* and *George E. Shaw*.

Contra, *Wm. D. Evans* and *Geo. C. Wilson*.

Opinion by STERRETT, C. J. Filed January 6, 1896.

It may be conceded that a *prima facie* case for the plaintiffs is presented in their statement of claim and exhibit appended thereto. The questions for consideration are, therefore, whether any of the material averments therein are sufficiently traversed or denied by the affidavits of defense, or whether any independent ground of defense, sufficient to carry the case to a jury, is presented in said affidavits. If so, judgment for want of sufficient affidavit of defense was rightly refused.

In passing on such questions as these, the invariable rule is that all unequivocal traverses or denials of material allegations, in support of the claim, and all material allegations of fact contained in affidavits of defense must be accepted as verity: *Knerr v. Bradley*, 105 Pa. 190. Referring to the facts of that case, it was there said: "The cause cannot be tried on the affidavits of the parties; it is sufficient if the affidavit distinctly declares that the clause, under which the defendant claims, is in and forms

a part of the contract, and is omitted from the copy filed. How or in what manner he may establish this, or whether he can establish it at all, will hereafter appear.

Among other things, the contract of May 2, 1893, provides in substance that the plaintiffs shall, on or before June 1st following, convey to the defendant the land described therein clear of all encumbrances. After stating "This sale is being made subject to the approval of Prof. Wm. M. Sloane, one of the M. E. Johnston heirs," the contract contains this further qualifying clause: "Possession to be given on delivery of deed, subject to leases to present tenants. Purchaser to receive all rents from the delivery of deed." In brief, it is an agreement to sell—subject to approval, etc.—and, at a future day, convey in fee to defendant clear of all then existing encumbrances, plaintiffs in the meantime to retain possession and receive the rents.

After substantially reciting the agreement and averring that in pursuance thereof they tendered defendant "a good and sufficient deed of conveyance of the property described in said agreement of sale, and then and there demanded the consideration money," which he refused to pay, the plaintiffs renew their tender; and further say "they have kept and performed all acts, agreements and covenants which they were bound to keep and perform under the contract or agreement aforesaid."

It is not our purpose to refer at length to defendant's averments in relation to the servitude or encumbrance on the land in question, alleged to have been created by the action of the Pittsburgh & Connellsville Railroad Co. in surveying, locating and adopting a route for a branch railroad across the land prior to tender of conveyance by plaintiffs, and even before the agreement in suit was executed, also in relation to when and how he was first informed of said encumbrance and what, upon further investigation, he learned in regard thereto, etc., also to defendant's express denial that plaintiffs kept and performed all acts, covenants and agreements which they were bound to keep under the contract; and his denial of all averments, contained in plaintiffs' statement, in conflict with those contained in the affidavit of defense. Our consideration of all these matters has led us to the same conclusion reached by the court below—that there is sufficient in the affidavits to carry the case to a jury.

The successive steps, necessary to be taken by a railroad company, invested with the power of eminent domain in acquiring first an inchoate and finally an absolute right or title to a road way upon or through the land of a private

owner, were fully explained by our Brother WILLIAMS, in *Williamsport R. Co. v. Railroad Co.*, 141 Pa. 407. Briefly stated they are: (1) Entry on the land, for the purpose of exploration, usually made by engineers and surveyors who, after running and marking one or more experimental lines, report the result of their work on the ground, with necessary maps and profiles, to the company employing them. (2) The selection and adoption, by the board of directors, of a line or one of the lines so run, as and for the location of the proposed road. (3) "Payment to the owner for what is taken and the consequences of the taking, or security that it shall be paid when the amount due him is legally ascertained."

The survey on the ground, followed by selection and proper adoption of a line for the proposed road, as was said in the above cited case, makes what was before experimental and open, a fixed and definite location. It fastens a servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation." It gives to the latter a standing to settle with and make compensation to the owner for the property thus taken and appropriated to its own use, and,—in case they cannot agree,—to give adequate security for the payment of damages when legally ascertained. Until such compensation is made, or in lieu thereof, approved security is given, the title of the owner is not divested. "As against him, the corporation, by its act of location, can acquire only a conditional title which ripens into an absolute one upon making compensation:" *Williamsport R. Co. v. Railroad Co.*, 141 Pa. 407, and cases there cited.

As was said in that case (p. 416), "the act of location is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages. Until such act neither can do so; for no right of damages vests in or accrues to the owner until there has been an appropriation of his property by the corporation: *Davis v. Railway Co.*, 114 Pa. 308." To the same effect are *Neal v. Railroad Co.*, 2 Grant, 137; *Wadhams v. Railroad Co.*, 42 Id. 303; *Beale v. Penna. R. Co.*, 86 Pa. 509.

Further consideration of the questions involved is unnecessary. We think the averments contained in the affidavits of defense

bring the case within the principles above referred to, sufficiently so at least to warrant the discharge of the rule for judgment, and send the case to a jury for full ascertainment, of all the material facts.

Appeal dismissed, at the costs of the plaintiff without prejudice, etc.

BOWERS v. BOROUGH OF BRADDOCK.

The borough is not entitled to have the viewer's report, assessing damages for a change of grade, set aside, and the case sent back to the same or new viewers, merely because the borough officials, after receiving proper service of notice of the proceedings to assess damages, failed to be present at such proceedings.

Under Act June 13, 1874, giving an appeal to the Common Pleas in cases of the assessment of damages for property taken or injured, and directing that the appeal shall be taken "within 30 days from the assessment of the damages or the filing a report thereof in court," the appeal must be filed within 30 days from the filing of the report.

Ten appeals of the Borough of Braddock, from the judgments of the Court of Common Pleas No. 3, of Allegheny county, entered in dismissing the petitions of the burgess of the borough, praying that the report of a jury of view to ascertain benefits and damages arising from the change of grade of Sixth street in said borough be set aside and the cases recommitted to them for continued consideration.

The facts appearing in the cases were as follows:

Upon the petitions of William Bowers, William Dougherty, Patrick Early, Frank Felder, Charles Koehl, Ann Hopkins, Enoch Squire, Thomas Lamin, P. G. D. Strang and George W. Berry, viewers were appointed to ascertain what damages, if any, were incurred by petitioners by reason of the change of grade of Sixth street between lot 131 on the "Masonic Bank Plan" and the Pennsylvania Railroad.

The viewers were appointed on July 10, 1894, and filed their report on August 2, 1894. On August 18, 1894, the borough of Braddock filed exceptions to the report of the viewers and an additional exception on October 26, 1894, leave having been obtained. On October 27, 1894, the petition of H. C. Shallenberger, burgess of the borough, was presented, averring that notice had been duly served on him of the first meeting of the viewers, but that he had inadvertently omitted to transmit the notice to the solicitor of the borough or clerk of councils, and had overlooked the fact that the notice had been served.

The exceptions to the report of the viewers were dismissed by the court, and on December 22, the appeal taken on December 20, 1894, by

the borough, was disallowed, the appeal not having been made in time.

The borough of Braddock appealed from this judgment, assigning as error the overruling of the exceptions to the report of the viewers, and refusing to allow appellant to appeal.

For appellant, *E. J. Smail*.

Contra, *William Yost*.

Opinion by GREEN, J. Filed January 6, 1896.

The first and principal question urged in the argument of the appellant is, "Does the Act of May 16, 1891, P. L. 75, supersede and repeal the Act of May 24, 1878, P. L. 129, in so far as it relates to the assessment of damages for change of grade in boroughs?" We have just filed an opinion in the case of *Seamon v. The Borough of Washington*, No. 91, of October term, 1895, the Western District, in which we decide this question in the negative, and hold that the Act of 1878 is not repealed by the Act of 1891. For the reasons there stated we make the same ruling in the present case.

As to the second question presented, we can see no reason why the court below committed error in refusing to set aside the viewers' report and send back the case to the same or new viewers. Even if we regard the affidavits of the officials on which the application was based, which we cannot do, they simply make out a case of negligence on their own part in not regarding a proper service of notice of the proceedings to assess the damages.

As to the third question, was the appeal of the borough taken in time, it is perfectly clear that it was not. The general Act of June 13, 1874, P. L. 283, which gives an appeal to the Common Pleas in all cases of the assessment of damages for property taken, injured or destroyed, directs that such appeal shall be taken, "within thirty days from the ascertainment of the damages, or the filing a report thereof in court, pursuant to any general or special act, and not afterwards." Whatever may be the precise meaning of the words "ascertainment of damages," it certainly does not mean an ascertainment *after* the report of the viewers has been filed in court, because the filing of the report is a definite act which cannot occur until after the viewers have acted in the ascertainment of the damages. Therefore, it is safe to say that the time within which the appeal must be filed is thirty days from the filing of the report. This very point was decided in the case of *Gwinner v. Railroad*, 55 Pa. 128. The filing of the exceptions to the report of viewers has nothing to do with the right of appeal. That right can only be exercised according to the terms in which it

is given. The hearing of the exceptions can go on and be completed before the case is actually tried, and if the exceptions are decided favorably to the appellant, so as to defeat the proceeding, no trial will be necessary. If otherwise, the trial can then proceed. The assignments of error are all dismissed. *Judgment affirmed*.

STRANG V. BOROUGH OF BRADDOCK.

DOUGHERTY V. SAME

EARLY V. SAME.

BERRY V. SAME.

FELDER V. SAME.

KOEHL V. SAME.

SQUIRE V. SAME.

LAMM V. SAME.

Opinion by GREEN, J. Filed January 6, 1896.

The judgments in these cases are affirmed for the reasons stated in the opinion just filed in the case of *William Bowers v. The Borough of Braddock*, No. 64, October Term, 1895. The motion to quash is refused as there is no inconsistency in filing exceptions to the report of the viewers and at the same time entering an appeal to the Common Pleas under the Act of June 13, 1874, P. L. 283. *Judgment affirmed*.

[See preceding case.]

WYKE v. WILSON.

If one elects to proceed for his rent under the statute conferring the right of distress, a failure to make the appraisal required by the statute renders him a trespasser *ab initio*.

Appeal of W. A. Wilson, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of trespass brought by John W. Wyke to recover for goods sold under an alleged illegal distress for rent.

At the trial before PORTER, J., it appeared that on April 1, 1893, plaintiff leased certain real estate from defendant's assignor. The lease contained the following clause:

"As a security for the rent, the tenant grants, bargains and sells to the lessor all property of every kind on, or to be brought on the premises, and whenever rent is unpaid the lessor may seize said property, on or off the premises, and sell the same on three days' notice for all rent due, etc., and for all rent not due hold the same as security."

On March 17, 1894, defendant distrained on plaintiff's goods but made no appraisal of them as required by law. He sold the goods on March 30, 1894. The evidence tended to show that on the day of the sale defendant forced his way into plaintiff's house with a loaded revolver, and during the sale pointed the revolver at several people.

Defendant's points were as follows:

1. Under and by virtue of the terms and con-

ditions of the lease which has been offered in evidence, the goods upon the premises which were seized and sold by the defendant were, as between the parties, the goods of the defendant, to be held by him, and if necessary to be sold by him in satisfaction of any rent due and in arrear under the said lease. *Answer*.—This point is refused. The lease gave the landlord certain rights, in addition to those given by law, but his legal rights and remedies were preserved, and when he undertook to proceed to collect the rent by distress, and sell upon the landlord's warrant, he was bound to proceed in the manner prescribed by law. (First assignment of error.)

2. If the jury believe that at the time said goods were seized and sold there was rent in arrear from the plaintiff to the defendant, then the defendant had the right to go upon the premises, with or without a landlord's warrant, and seize and sell such of said goods as were necessary to satisfy the rent in arrear, first giving three days' notice of the time and place of sale. *Answer*.—This point is refused. If the landlord elected to proceed by landlord's warrant and distrain for rent, it was his duty to make an appraisement and proceed according to law. (Second assignment of error.)

3. If the jury believe that at the time said goods were seized and sold by defendant, there was rent in arrear, and that the defendant sold the same *bona fide* at public sale for and towards the satisfaction of said rent, after giving more than three days' notice of the time and place of sale, then such sale was in itself lawful, and the plaintiff cannot recover in this action, unless the jury find that the defendant or those acting under him, was guilty of unlawful acts in the conduct of said sale. *Answer*.—There being no question under the evidence that the landlord elected to proceed by landlord's warrant, the constable making the distress and advertising the sale under the warrant, and actually selling under the proceedings upon the warrant, the third point is refused. (Third assignment of error.)

Verdict and judgment for plaintiff for \$125. Defendant appealed, assigning for error (1-3) above instructions, quoting them.

For appellant, *Thomson & Thomson*.
Contra, *J. M. Swearingen*.

Opinion by MCCOLLUM, J. Filed January 6, 1896.

While the evidence descriptive of the defendant's conduct at the sale was conflicting, it clearly showed that he went there prepared for war. He carried with him a loaded revolver

and his exhibition of it there was, to say the least of it, consistent with a purpose on his part to intimidate the plaintiff and his family. When it is considered that the property he proposed to sell to satisfy his disputed demand for rent was not worth, according to his estimate of its value, more than fifteen dollars, and that he could not realize from the sale of it more than seven dollars, exclusive of costs, it would seem that the methods he adopted to compel the sale were too expensive. This is a view of them that may have occurred to them after the verdict.

All the specifications of error may be considered together because they really raise but one question and that is whether in making the sale the defendant was a trespasser. We agree with the learned court below that he elected to proceed for his rent under the statute which confers and regulates the exercise of the right of distress, and that having so elected he was bound to conform to its provisions in order to validate the sale. That his lease gave him another procedure for collecting the rent did not qualify or dispense with any of the requisites of the proceeding under the statute. If he failed to comply with the requirements of the latter he became a trespasser *ab initio*, and there is nothing in the lease which can relieve him from the consequences of his noncompliance. The property was not distrained as his but as the property of the tenant, and the proceeding subsequent to the seizure of it should have been conducted precisely as if the lease had not given him another remedy: *Fernwood Masonic Hall Association v. Jones*, 102 Pa. 307.

It is conceded that the appraisement required by the statute was not made, and it is settled that the failure to make it was fatal to the proceeding and rendered the defendant a trespasser *ab initio*: *Kerr v. Sharp*, 14 S. & R. 399; *Quinn v. Wallace*, 6 Wharton, 452, and *Brisben v. Wilson*, 60 Pa. 452. *Judgment affirmed*.

Superior Court, Penn'a.

WRIGHT v. MONONGAHELA NATURAL GAS COMPANY.

Where parties agree that a thing shall be done, and no length of time is specified in which it is to be completed, the law presumes that reasonable time shall be given, considering the nature of the business. The parties to a contract where there may be some ambiguity, always have a right to, and may put their own construction upon their own lease; and if it appears to the jury that that construction was mutual, and that both parties agreed that it was the proper construction, although it may not be the construction the court would adopt on an inspection of the written lease, still

the construction of the parties is the one to be adopted by the jury in an action upon the contract.

Appeal of the Monongahela Natural Gas Company, defendant, from the judgment of the Court of Common Pleas of Washington county, in an action in *assumpsit*, wherein William Wright was plaintiff.

The facts of the case are set forth in the opinion of the court.

On the trial before MCILVAINE, P. J., the defendant asked for binding instructions, which request was refused. (Fourth assignment of error.)

The court charged:—

"We think, however, that, taking the whole lease together and the subject matter of the contract, and what the parties contracting were presumed to know concerning the business that they were contracting about, that this lease means: That the second party was to pay two dollars an acre for the further or unnecessary delay—delay further than was necessary—in drilling a well, and the time from which that was to be estimated was the time above specified, September 12, 1890." (Second assignment of error.)

The court admitted testimony of the plaintiff to show what acts the company had done under the first lease as throwing light upon what was understood in the second. (First assignment of error.)

Verdict for the plaintiff and judgment thereon. The defendant took this appeal and filed assignments of error, *inter alia*, as above indicated.

For appellant, *R. W. Irwin*.

Contra, *J. H. Murdoch*.

Opinion by ORLADY, J. Filed July 16, 1896.

March 12, 1890, the plaintiff leased his farm, containing one hundred and eight acres to James B. Oliver, for the purpose and with the exclusive right of drilling and operating for petroleum and gas. No well was drilled, but the rental was paid for two quarters, which extended the lease until September 12, 1890, when it was declared forfeited by the lessor for non-payment of rent. On October 11, 1890, a new writing dated September 12, 1890, was executed and a quarter rent paid from the earlier date, to cover the lost ground from the old lease as stated by defendant's representative. This lease was assigned to the defendant company and the rent under it was paid to the plaintiff as it became due to date of June 12, 1892. Suit was instituted to recover the rent to date of June 26, 1893, and a verdict returned for \$159.10.

Appellant contends that the covenant in the second lease, "It is further agreed that the party

of the second part shall pay to the party of the first part for further delay an annual rental of two dollars per acre on the said premises from the time above specified for drilling a well until such well shall be drilled" is unintelligible, and so ambiguous as to render the lease void.

Inspection of the second lease shows that the parties deliberately intended to effect a contract by a writing in a legal form. It was signed and sealed by the lessor in presence of the person acting for the lessee and acknowledged before a justice of the peace. A printed form was used and the blanks were filled in to express the intention of the parties. The evidence oral and in writing further shows that until June 12, 1892, the parties interested acted upon the lease by the payment of the rent due thereunder, as if they had so framed it, as to express their understanding. The jury was instructed, "We think that taking the whole lease together and the subject matter of the contract, and what the parties contracting were presumed to know concerning the business that they were contracting about, this lease means this: that the second party was to pay two dollars an acre for the further and unnecessary delay—delay further than was necessary in drilling a well, and the time from which that was to be estimated was the time above specified, September 12, 1890." Where parties agree that thing shall be done and no length of time is specified in which it is to be completed, the law presumes that a reasonable time will be given considering the nature of the business. The parties to the contract where there may be some ambiguity, always have a right and can put their own construction upon their own lease; and if it appears to the jury that that construction was mutual, and that both parties agreed that it was the proper construction, although it might not be the construction, the court would adopt on an inspection of the written lease, still the construction of the parties is the construction the jury should take in a suit brought upon the contract.

The words used in the contract were not unmeaning. They had special reference to the subject matter, and the only question of doubt was as to the application of the words, "time above specified for drilling a well." The ambiguity was not in the minds of the parties to the contract. They fully understood it; had executed and abandoned a prior contract in relation to the same use of the same land, and had again met, contracted and acted to their mutual understanding. It was competent under the present lease to show these facts by parol as the paper was capable of being construed in an intelligible way only under their treatment of it.

In *Patterson v. Graham*, 164 Pa. 234, it is said, "No time was expressly fixed in the agreement within which the timber was to be cut and removed. But the intention of the parties may be ascertained from the other stipulations in the agreement and facts *dehors* the agreement, such as the situation of the parties, and the circumstances surrounding them at the time they entered into it."

Evidence of payment of the rent under the second lease was received without objection, and the court properly submitted to the jury the effect to be given to these acts of defendant in aid of the construction of the doubtful clause: *Pratt v. Campbell*, 24 Pa. 186; Wharton on Evidence, §§ 941 and 971.

The oral evidence received did not contradict the writing, but only made clear by the acts of the parties how they had interpreted it: *Steamboat Co. v. Brown*, 54 Pa. 77.

It is the dictate of common sense and therefore a rule of law, that every written instrument is to be interpreted according to the subject matter, and yet the nature and qualities of the subject matter are seldom fully stated, often only alluded to in the writing. Many cases might be cited from the books to mark the distinction, too often lost sight of, between evidence to alter the language of a written instrument and evidence to define the position of the parties, and the nature and condition of the subject contracted about. So long as parties call upon courts of justice to administer their contracts, they must expect them to be administered as nearly as may be according to the very intention and understanding that were present in the minds of the parties when the contract was signed, and to this end courts take the language employed and supply it to the surrounding circumstances exactly as they believe the parties applied it: *Barnhart v. Riddle*, 29 Pa. 92; *Graver v. Scott*, 80 Id. 88; *Irvin v. Irvin*, 142 Id. 271.

The case was fairly tried in the court below. The assignments of error are not sustained, and
The judgment is affirmed.

Court of Common Pleas No. 1.

GIPNER v. GIPNER.

No. 143 March T., 1896.

Opinion by STOWE, P. J. Filed October 29, 1896.

Plaintiff's bill alleges that he married defendant in the year 1870; that defendant abandoned him, taking their three living children with her in 1892 to Chicago, Iowa, and different parts of

the State of California, and has since refused to communicate or allow their children to communicate with him.

That while plaintiff was engaged in profitable business in Pittsburgh in 1889 he purchased a lot of ground situate in the Twentieth ward of said city from one John S. Connelly, paying for the same \$1900, and allowed the deed to be made to his wife (the defendant), and that afterwards, in 1890, he also bought through Black & Baird a house and lot situate at 5753 Ellsworth avenue, Pittsburgh, for which he paid \$7,000, and had the deed made to his wife (the defendant), intending the same for a home for himself and family. He then avers that the prevailing reason, outside of his love and affection for her, was that she was a kleptomaniac, etc., and he hoped and believed that by placing the titles in her name she would feel more independent, be better satisfied and abandon her evil way.

He also alleges that after he had fully paid for the above-mentioned properties, defendant induced him to sell out his business on Liberty street, for which she took the money and refused to give plaintiff any of his own money and thereby leaving him penniless and helpless, etc.

In reply to these allegations in plaintiff's bill defendant answers that she was married to plaintiff in 1871, that it is true that she left Pittsburgh with her three children in 1892, hoping to escape the humiliation and disgrace consequent upon the continued bad conduct of plaintiff, and being obliged to support herself and family, and other matters more particularly set out in the third section of her answer.

In the fourth section of her answer she says: "I absolutely deny, etc., the allegation of the fourth paragraph, averring that complainant bought or paid the sum of \$1900 for the lot of ground in the Twentieth ward, as mentioned, or that he had directly or indirectly contributed a dollar of his money to the purchase thereof, or that he was engaged in profitable business at that time, enabling him to do as he alleges. I aver that the whole of said purchase money was earned and acquired by my individual labor and earnings in keeping of a boarding house on Penn avenue, Pittsburgh; said earnings being deposited in my name in the Dollar Savings Bank, and on closing the sale and delivery of the deed in my own name I signed and delivered my own individual order on said fund for said \$1900, etc., and have out of my own earnings paid all taxes and charges assessed thereon. All this acquisition of title, etc., being without any arrangement or agreement to hold the same in trust for plaintiff."

In the fifth section, she also denies as untrue

the allegations of the fifth paragraph, alleging that plaintiff purchased the premises from John Sweeney, or that he had the deed placed in her name as trustee for him. And on the contrary alleges that she purchased the premises and paid all the money for it out of her own means, and that plaintiff contributed nothing of the purchase or gave any directions or had anything to do with the form of the deed.

The evidence shows that plaintiff and defendant were married in 1871 and had in 1892 and have now three children living. Plaintiff was engaged in the tobacco business in 1889 and for some time previous, and to outward appearances was doing a fair business up to this time, but it seems that his wife had rented some time previous to this date,—perhaps several years,—a house on Penn avenue, which she rented out to "roomers" and paid the rent for out of her own earnings. The exact length of time does not appear in the evidence. But according to her evidence, which in this respect is uncontradicted, it must have been some two or three years at least previous to the purchase of the first lot in 1889. According to the defendant's evidence, for some time previous to this time, plaintiff had not been making anything out of his business, so far as she knew, and at all events she appears to have been herself helping to make a living for the family, as before stated.

When things were in this condition, the defendant, having some ten hundred dollars in bank, which she says was the result of her own earnings and which plaintiff says was money he gave her with the intention of having it eventually put into a home for their mutual benefit; the lot in the Twentieth ward was purchased from John S. Connelly in 1889. The evidence satisfies us, and we therefore find that this sale was brought about by the interposition and through the negotiations of defendant, that the money (\$1,000) paid on account of the purchase money was money in bank in her name, and was money belonging to her, either given her by her husband or allowed to be used and treated as her own, by her husband, and the product of her own labor, or earnings apart from her husband.

We think the same facts are fairly shown in regard to the lot bought from John Sweeney in 1890 for \$7,000.

Defendant arranged that purchase, raised \$1,000 on a mortgage of the lot before purchase from Connelly and out of her own earnings from renting rooms in her house, which she had saved, she raised the balance of \$1500 and then gave a mortgage for \$5,500 for the balance on the lot itself which she afterwards paid out of \$3,800

which she had inherited from her mother and money she earned by her own industry and labor. It is true she left her husband, and we are of opinion under the evidence that her conduct in that respect was not reprehensible. It really seems as if it was about the best thing she could do. She has supported herself and children since that time, and he has not, so far as the evidence shows, given any great disposition or ability to do so himself.

We think plaintiff has utterly failed to make out such a case as would justify us in granting him any of the prayers set out in his bill, and it is therefore now ordered, etc., that plaintiff's bill be dismissed at his costs.

For plaintiff, *James K. Wallace*.

For defendant, *Chas. F. McKenna and W. E. Fulton*.

McNEIL v. McNEIL.

The defendant in a divorce suit is ordered to pay the plaintiff \$75 per month for support *pendente lite*. The case is decided in favor of the plaintiff and alimony fixed at \$600 per year. Plaintiff appeals to the Supreme Court and the judgment is affirmed. *Held*, that during the time the appeal is pending the plaintiff should pay the defendant \$75, the alimony fixed *pendente lite*.

No. 201 June T., 1896, Ex.

Opinion by STOWE, P. J. Filed October 22, 1896.

We think the auditor erred in not finding that plaintiff was entitled under the order of court of October 14, 1891, to a continuance of the allowance for her support and maintenance of \$75 per month until the final decree of the Supreme Court made November 3, 1893.

It appears from the record that on November 14, 1891, defendant was ordered to pay plaintiff \$75 per month from July 1, 1890, "*pendente lite*."

The plain meaning of this order was that that amount should be paid so long as the cause was undetermined and that did not happen till November 3, 1893, when the cause was disposed of by the Supreme Court. The allegation that the final decree fixing, *inter alia*, that defendant should pay plaintiff the sum of \$600 per annum was a supersedeas of the former order we do not think well founded. If the cause had then terminated no doubt but this position would be well taken, but when the appeal was taken to the final decree of this court, thereby suspending its operation and preventing the plaintiff from enforcing it in any respect, it does not seem reasonable to say that the former interlocutory order for maintenance is no longer of any effect, for it follows as a necessary result that if that order was suspended or set aside by the final decree of this court, and that decree

could not be enforced because an appeal was taken (as we understand it could not be), that from the date of the decree until the Supreme Court finally disposed of it the plaintiff could not compel the payment of anything either for maintenance or prosecution of her suit. We do not think any such result is required by the law, and it certainly would work manifest injustice to the plaintiff. We are clearly therefore of opinion that the interlocutory order for the payment of \$75 per month was in force until the final decree of this court was rendered effective to the *non pros.* in the Supreme Court. Nor are we without authority upon this question, for it is very distinctly held in New York, in *McBride v. McBride*, 53 Hun, 401, and *Beadlestone v. Beadlestone*, 103 N. Y. —, that when a judgment of divorce has been granted to a wife and the husband has appealed, the action is pending until the determination of the appeal, and alimony "*pendente lite*" continues till final decree.

The first, second, third and fourth exceptions filed by Margaret McNeil are sustained. The exception filed by the German Savings Bank is overruled and the auditor's report is hereby confirmed, except as to the amount to be paid plaintiff, which is hereby determined to be \$1,585.90, instead of \$1,462.25, as determined by the auditor, thus leaving, as coming to James McNeil, defendant, the sum of \$7,10.46, instead of \$7,134.11, as found by the auditor.

And now, October 22, 1896, the petition to hold and retain the money coming under the above distribution to James McNeil having been duly considered, it is hereby directed that said James McNeil give security, to be approved by the court, in the sum of \$5,000, for the payment of the decree made in the said case of *Margaret McNeil v. James McNeil*, in accordance with the terms therein set forth, and thereupon the court will direct the money in court, to which he is entitled, to be forthwith paid to him.

By the Court.

For plaintiff, *Thomas M. Marshall and W. W. Thomson.*

For defendant, *J. S. & E. G. Ferguson.*

For Germania Bank, *George W. Guthrie.*

Court of Common Pleas, BLAIR COUNTY.

UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY v. DOUGHERTY.

The Act of May 22, 1895, P. L. 111, does not create a lien for taxes on real estate.

No. 103 Jan'y T., 1896. Rule on sheriff to deliver deed to purchaser.

Opinion by BELL, P. J. Filed February 19, 1896.

At the sale of defendant's real estate by the sheriff, on January 10, 1896, notice was given in accordance with the provisions of Act of May 22, 1895, P. L. 111, that certain taxes assessed against said real estate were unpaid. The question now for determination is, whether such taxes shall be paid "out of the proceeds arising from the sale first after payment of costs of sale."

Said question has been answered in the affirmative by Judge LONGENECKER in *Snyder v. Mogart*, 17 Pa. C. C. R., p. 1 (Dec. 7, 1895), and in the negative by Judge BIDDLE, of Cumberland county, in *Wetzel v. Goodyear*, 17 Pa. C. C. R., 110.

The opinion of the court in *Snyder v. Mogart* was cited by counsel for the respective tax collectors as their argument, and, while it is not without some hesitation that I differ from the learned judge of the sixteenth judicial district, in the present instance I have come to the conclusion that he is wrong, and that he has permitted his desire to protect the meritorious claim of the tax collector to warp his judgment.

The title to said Act of May 22, 1895, contains no hint that its purpose is to create liens; on the contrary, it is entitled an act for "the divestiture of liens of taxes," and it is very questionable whether it would not be deemed to be unconstitutional, as violating section 48, Article III, of the Constitution, which directs that the subject or object of the bill "shall be clearly expressed in its title," if it did attempt to create a lien for taxes.

Moreover, the preamble shows that the legislative intent was to relieve purchasers at sheriffs' sales, not tax collectors, and that the "hardship" to be obviated was one "resulting" to purchasers, not to collectors.

Said Act of May 22, 1895, does not by express language create any lien. A sufficient answer to the idea advanced that a lien is created by necessary implication would seem to be a citation from the opinion of Chief Justice GIBSON in *Burd v. Ramsay*, 9 S. & R., 109, wherein he overrules a similar attempt to create a tax lien:

"If the Legislature had intended to create a lien, they would have provided some direct means of enforcing it; and the inference from the want of such a provision, is irresistible. It is altogether incredible that they would have trusted to the uncertain and improbable event of the land being at some period sold by the sheriff, * * * in which case only the lien would be availing."

I agree with Judge BIDDLE in the conclusion reached by him in *Wetzel v. Goodyear*, *supra*,

that said Act of May 22, 1895, is only applicable to such taxes as are made liens on land by other Acts of Assembly, and I deem it unnecessary to add anything further to what has been said by him in his opinion in that case.

The Supreme Court having, in *Van Loon v. Eagle*, 171 Pa. 158, declared the Act of June 2, 1881, to be unconstitutional, the only taxes, within the limits of Blair county, which can be liens on land, are city taxes, assessed in the city of Altoona. Said city taxes are made liens by section 11, Article XVII, of Act of May 23, 1889 (Purdon's Digest, page 1567). The petition on which the present rule was founded, concedes that any city taxes must be paid out of the proceeds of sheriff's sale, hence it is unnecessary now to decide the question suggested by Judge BIDDLE in *Wetzel v. Goodyear*, *supra*, as to whether the Act of May 22, 1895, may not be unconstitutional by reason of being class legislation since it applies to only a portion of Blair county, and only a portion of the State of Pennsylvania.

But, for the collection of all taxes, other than city taxes, in Blair county, collectors will have to look either to the person of the taxable, or to the personal property on the premises at the time of the assessment. If there is no personal property on the premises, the only remedy left to the collector, so far as the land is concerned, is to make return under the statutes providing for sale of land for taxes.

As to all taxes, except city taxes, rule absolute.

For rule, *A. H. McCamant*.

Contra, *J. H. Smith and Craig & Bowers*.

Orphans' Court.

In re Estate of MICHAEL KREBS, Deceased.

The distinguishing characteristic of an active trust is that there shall be substantial duties attached to the use of property which require that the legal title shall be vested in a trustee.

Petition to declare trust executed.

HAWKINS, P. J.

STATEMENT.

The question involved in this matter is whether or not an active trust was created by the will of Michael Krebs in respect of the share given to his son George in the following clause:

"Fourth.—It is my will that after the death of my beloved wife Dorothy Krebs, all the property real and personal then left by her shall be divided in equal parts or shares between my children, with the condition that the money loaned to George Krebs shall be deducted from his share, and with the condition that George

J. Krebs shall only receive the interest of his share, or as much as in times of sickness or accident my executor will give him to meet his wants."

This share was allotted in partition to a trustee without objection, and is now held in trust; but it is insisted that this was a mistake, and the court is asked in the present proceeding to declare the trust executed.

OPINION. Filed October 28, 1895.

It is insisted that because there was in the first instance an absolute devise and no gift over, George J. Krebs took in fee. If this was all, the conclusion must be conceded; but it leaves out of view the condition attached that he should "only receive the interest of his share, or so much as in times of sickness or accident the executors may give him to meet his wants." "No principle," said Mr. Justice STRONG, in *Sheet's Estate*, 52 Pa. 257, "is better settled than that if the testator in one part of his will gives to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a lesser interest only, the prior gift is restricted accordingly. Subsequent provisions will not avail to take from an estate previously given qualities that the law regard as inseparable from it, as for example, alienability; but they are operative to define the estate given, and to show what without them might be a fee, was intended to be a lesser right." Applying this principle what was the intent here? There is no doubt of an intent to vest absolutely in George J. Krebs a beneficial estate; but did the discretionary power vested in the executor create a valid restraint upon its use? If this implied an active trust, it did. The creation of a trust, whether temporary or continuous, is entirely consistent with the devise of an absolute beneficial estate. It is not contradictory of the estate, but a mere qualification of its use, and only establishes a new and consistent relation: *Ivory v. Burns*, 56 Pa. 30. An impression seems to have somehow arisen that because there is no gift over, there can be no trust; but a gift over is simply a circumstance to be taken into consideration in ascertaining the quantity of the beneficial estate, and is just as consistent with the existence of a trust, as if words of inheritance had been used. All the authorities go to show that there may be an absolute beneficial estate consistently with a temporary or a continuous trust. The test of the validity of a trust is a lawful purpose legally declared; and its duration is measured by the accomplishment of such purpose. Apt illustra-

tions of this principle are coverture and spendthrift trusts. Thus, in *Berg's Appeal*, 166 Pa. 118, it was insisted that the testator had used language in the first instance which created a fee-simple in the clearest and most unequivocal terms; but because this clause was coupled with the exclusion of the husband, it was held that "the use was absolute; and the trust for coverture only." So, in *Millard's Appeal*, 87 Pa. 457, where trustees were directed to pay the income to testator's nephew, and, in their discretion, the corpus, from time, and there was no gift over, the court said that the plain intent was to give "the entire beneficial interest to his nephew * * * and at the same time prevent the fund from being wasted through idleness or intemperance;" and thereupon gave the fund to the personal representatives of the nephew then deceased. So, on the other hand, in *Shaeffer's Appeal*, 8 Pa. 38, where the interest of a fund was given for life to testator's widow without a gift over, the trust was sustained, although the next of kin were held entitled in remainder. The difficulty in the cases has been, not in the existence of power, for that is conceded, but whether or not the language employed was enough, to create an active trust? There runs through all of them, however, this distinguishing characteristic, that there shall be substantial duties attached to the use of an estate which require that the legal title be vested in a trustee. Its creation does not depend upon any particular form of words, but upon the plain intent. Among the recognized classes of such trusts is that in which it is left to the discretion of the trustee to withhold or give specified donees trust property. If there be a condition precedent to the devise that the trustee shall exercise his power, no interest will pass to the donee until the power be exercised in his favor; and if the trustee refuses or neglects, the gift cannot be enforced by the courts unless it be shown that he was influenced by improper motives: *Hill on Trusts*, 489. Thus, in *Pink v. Thuisy*, 2 Mad. 157, where a legacy was given "under the condition hereinafter written," and in a subsequent part of the will the executor was authorized to give "the principal only" in case he should deem it advantageous to the legatee, "the trust was sustained." So, in *Keyser v. Mitchell*, 67 Pa. 473, where an absolute discretionary power was given a trustee over the income, it was held that the donee had nothing until this discretion was exercised. The same principle was recognized in *Millard's Appeal*, *supra*. The result of the cases in respect of those trusts which are not executed by the statute of uses is concisely stated in *Perry on Trusts*,

sec. 305, thus: "If any agency, duty or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised, or duty performed by the trustee in applying the rents to a person's maintenance, or in making repairs, or to preserve contingent remainder, or to raise a sum of money, or to dispose of the estate by sale. In all these and in other and like cases, the operation of the statute is excluded and the trust or uses remain mere equitable estates. So if a trustee is to exercise any discretion in the management of an estate, or in the investment of the proceeds or the principal, or in the application of the income; or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division, or until a request for a conveyance is made." It is obvious that title in the trustee is essential to the exercise of the discretionary power to withhold or give an estate: *Marshall's Estate*, 147 Pa. 77.

Tested by these principles solution of the question involved here is easy. The executors are in plain terms invested with discretionary power to withhold or give the trust estate. While there is in the first instance an absolute gift, it is coupled with restraint on the manner of its use. The devise is expressly made "with the condition that George J. Krebs shall only receive the interest of his share or as much as in times of sickness or accident" the executors "will give him to meet his wants." The testator seems, as was said in *Hibb's Estate*, 143 Pa. 217, to have foreboded the thriftless character of his son, and therefore substituted the discretion of the trustee as to the manner of use of the estate; and the direction to deduct the money which testator had loaned George from his share suggests the reason for the declaration of trust in respect of the residue which immediately follows. The plain and lawful purpose was to prevent his son from coming to want; and for this it was essential that title should be in the trustee. The trust was therefore active, and the petition must be dismissed.

The case of *Silkritter's Appeal*, 45 Pa. 365, upon which petitioner's counsel mainly relied in argument, is plainly distinguishable from this. All that was decided there was that the direction as to interest was not sufficient to overcome the force of the prior absolute gift: *Ritter's Estate*, 148 Pa. 577; while here there was an imperative discretion vested in a trustee to withhold or give the estate which made the trust essentially active.

For petitioner, *J. S. & E. G. Ferguson*.

For trustee, *H. A. Miller*.

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PITTSBURGH, PA., NOVEMBER 11, 1896.

In Memoriam.

Tribute of the Bar of Allegheny County on the
Death of William D. Moore, Esq.

The members of the Allegheny County Bar assembled on Friday, the 6th inst., at 3 P. M., in the Association rooms, to take appropriate action regarding the death of WILLIAM D. MOORE, Esq. The meeting was called to order by C. C. Dickey, Esq., and organized by the election of the following officers: President—Hon. M. W. Acheson. Vice-Presidents—Hon. W. G. Hawkins, Jr., Hon. E. H. Stowe, Hon. F. H. Collier, Hon. J. W. F. White, E. A. Montooth, John Dalzell, P. C. Knox and M. A. Woodward, Esqs. Secretaries—S. C. McCandless, John M. Rourke and Joseph Foraythe, Esqs. Committee on Resolutions—Hon. Thomas M. Marshall, D. D. Bruce, D. T. Watson, John H. Kerr and F. C. McGirr, Esqs.

The following minute presented by the committee was adopted with the suggestion that the same be entered in the minutes of the several courts of the county and the Bar Association, and a copy sent to the family of the deceased:

We are assembled to give some expression to the feeling that actuates us from the event which occurred last Monday, November 2, 1896, the death of WILLIAM DAVID MOORE, when our brother passed from the "Earthly Home" to that "House not made with hands, eternal in the Heavens."

WILLIAM D. MOORE was born at Harper's Ferry, Va., January 15, 1824. He removed to Pittsburgh with his parents at an early age, attended the Western University and graduated from there in 1841. Two members of our bar, who still survive him, were classmates of his at the University, viz., David D. Bruce and John R. Large, Esqs. After leaving the University, Mr. MOORE entered the Western Theological Seminary, to prepare himself for the ministry; and graduating therefrom in 1844, he was ordained as a Presbyterian minister. For years he was pastor of the Long Run Church near Greensburg, Pa., and also pastor of a church at Greensburg, and then went to Oakland College, Mississippi, in 1854, where he was professor of Natural Sciences, for four years. He then resigned his professorship to accept the same chair in the University of Mississippi, at Oxford, in 1858. Here he remained till the War of the Rebellion interrupted this, to him, congenial occupation. He came North and joined the Union Army, receiving the ap-

pointment as chaplain of the Sixth Pennsylvania Heavy Artillery. He served throughout the war, and, returning to Greensburg, studied law.

Our deceased Brother WILLIAM D. MOORE was in many respects eminent in the profession of the law, although he came to its study and practice after he had passed the meridian of his life and from the arduous, and, to some degree, secluded labors of another profession not entirely cognate to the general practice of the law. He brought to the study of the law a mind well and largely stored with general information. He had special and extraordinary knowledge of all the physical sciences. He had an accurate and intimate knowledge of chemistry, especially organic chemistry. He was, in particular, an accomplished botanist, and had a passionate love for flowers, so that he had them always about him and did not consider himself dressed without a flower in the lapel of his coat. He had made anatomical knowledge familiar to his mind by study and association with those whose profession was in that line of acquisition. His pathological acquirements were numerous and a source of constant pleasure to himself and his associates. When he left the office of his preceptor and personal friend, Edgar Cowan, of Greensburg, in the Autumn of 1866, a man of large experience and national reputation, he removed to Pittsburgh for a wider field of practice than could be found in a rural community. Entering the office of United States District Attorney as assistant to Mr. Carnahan, he was thrown into a line of criminal practice, and when he entered into general practice at our county bar, he was known as a criminal practitioner, and in that line he achieved honorable distinction. His knowledge of the sciences, chemistry and anatomy, was helpful and fruitful to his success in the trial of many cases well known to us all. The medical witness who assumed large superiority on the witness-stand, frequently came to grief under the pitiless cross-examination of Mr. MOORE. We could recall particular instances of this character, but personal reference to third parties would be out of place in this memorial. In the trial of homicide cases, the deceased was quite successful and distinguished. His accurate and specific knowledge of science was very effective.

In one regard he was much distinguished, and had certainly no superior at our bar,—the accurate knowledge of language and its fitness and value in the expression of thought. He was in his own person a Lexicon of pure diction; whatever he once mastered, was his own forever. Felicity of expression with pointed force, was peculiarly within his power. Mr. MOORE was well acquainted with the modern languages, and as a classical scholar he had few equals.

Mr. MOORE was an acute sufferer for many years. His ailments interrupted, and, in some instances, denied, the calm and full exercise of his natural powers and many attainments, and at times called for fault-finding at the bar; and in his business and social life the ailments of his body affected his manners, and apparently made him unreasonably harsh and fierce in the encounters and strife of legal battles.

To those who knew him well, however, and who met him in his office after court hours, or in his home, he was most genial and kindly, and a conversationalist of the most entrancing kind. At such times he was all gentleness, and his speech fluent, graceful, refined and most beautiful in all respects. The poetical quality was highly defined in him, and he has written many poems of great merit. His literary attainments were of the highest order, and those who have heard him speak on literature and flowers his favorite subjects, have ever experienced a lasting delight. He was a great admirer of Thomas Carlyle, and often said that Carlyle would not

be fully appreciated for one hundred years to come—that he would not be understood before that time.

It will be long before we have a man of his equal in scientific and literary attainments in the practice at our bar.

His social relations and friendship require no comment here. He has lived and passed the Psalmists' limit, three score years and ten, before he was called to the higher sphere of existence, and we sorrowfully submit this slight memorial of our departed brother.

Addresses were made by Messrs. Thomas M. Marshall, David D. Bruce, F. C. McGirr, William Blakeley and John H. Kerr; and the following poem, written by Mr. MOORE on the occasion of a dear friend's death, was read:

On the day before his death I asked Dr. Reiter how he felt; he answered, "Drifting away." We had, years before, seen a little boy who had thoughtlessly entered a boat, which the tide carried out. He was rescued, but I have no doubt the incident was recalled, and applied to himself, by Reiter, thereupon this occurred to me:—

"DRIFTING AWAY."

Drifting away! through the darkness afar,
I hear the beat of the tide on the bar,
And vainly look upward for moon or star.

Up out of the murk, come the muffled moan,
The mingled sobbing and sighing and groan,
Of the cruel waves, that make him their own.

This is their merciless message to me:
The friend you have loved has ceased to be;
The face you have seen, no more shall you see.

And never again on the sea or land,
On the pine-clad hill, or the wave-worn strand,
Shall you list to his voice, or clasp his hand.

Oh, God! must I hear in the waves' wild roar,
Only this, as I walk on the lonely shore,
This, "Drifting Away," to return no more?

Not long shall I wait, mid doubtings and tears,
In blindness and darkness and falling tears—
I shall know the secrets of all the years.

Supreme Court, Penn'a.

PENNSYLVANIA RAILROAD CO. v. GREENSBURG, JEANNETTE AND PITTSBURGH STREET RAILWAY CO.

SAME v. GREENSBURG AND HEMPFIELD ELECTRIC STREET RAILWAY CO.

Under the Act of May 14, 1889, a street railway company has the right to build and operate a line through the streets of boroughs and townships and over private property, but it cannot so build any part of its line until it has obtained consent for it throughout the entire distance.

A steam railway is not in position to question the rights of such a street railway having *prima facie* rights, unless it can show some damage or interest special to itself different from that of the general public.

A steam railway company has the right to object until a bridge over its right of way is made safe for the street railway cars to pass over it.

Appeals by the Pennsylvania Railroad Company, plaintiff, against the Greensburg, Jeannette & Pittsburgh Street Railway Company, and by the same plaintiff against the Greensburg & Hempfield Electric Street Railway Company, from the decree of the Court of Common Pleas of Westmoreland county, on a bill in equity filed for an injunction.

The facts as found by the court below, McCONNELL, J., were as follows:

The affidavits filed on the granting of the preliminary injunction in this case set forth, *inter alia*, as follows:

"That in the borough of Jeannette two branch tracks of the said Pennsylvania Railroad Company are constructed from a point west of the Seventh street overhead bridge in said borough in a southerly direction to various manufacturing industries, and that said branch tracks cross a driveway known as Clay avenue extension in said borough, the said Clay avenue extension never having been formally and legally opened as a street of said borough.

"That the said Greensburg & Hempfield Electric Street Railway Company and the Greensburg, Jeannette & Pittsburgh Street Railway Company, defendants herein, are about to break said tracks with the intention of placing therein crossing frogs to be used by the said electric railway company in the movement of its cars to and fro across the said branch of the Pennsylvania Railroad Company at grade."

The contention of the complainant is, that the existence of the above recited facts demonstrates the illegality of the proposed act of the respondent, for it is said the respondent is only authorized, if it has any authority at all, to occupy the public streets, and that Clay avenue extension is not a public street.

If the facts recited exist, the law deducible from them is as contended for by complainant.

The testimony taken bears principally upon the question of whether the facts exist as above stated.

Without forestating what a full hearing may ultimately show to be the facts of the case, it now fairly appears from the evidence before the court, that the main line of the Pennsylvania Railroad passes through the borough of Jeannette. South of the main line of said railroad in the borough of Jeannette are located the factories, warehouses, stockhouses, etc., of the Chambers & McKee Glass Company. From a point west of the Seventh street overhead bridge spanning the main line of the railroad, two sidings or branch tracks are constructed which extend to the factories, warehouses, stockhouses, etc., of the Chambers & McKee Glass Company.

These sidings are from fifteen hundred to eighteen hundred feet in length, and are used by the railroad in shipping supplies to, and conveying their product from, the works aforesaid.

These sidings intersect what is called Clay avenue extension—the driveway, as complainant designates it; the public street of the borough of Jeannette, as the respondents designate it.

On this Clay avenue extension the Greensburg, Jeannette & Pittsburgh Street Railway Company has laid its track with the permission of the borough of Jeannette, and was about to break the track of the railroad company and to place therein such frogs and other devices as would enable it to cross at grade, when it was stopped by the service of the injunction in this case.

In 1887 or 1888 the land now occupied by the Chambers & McKee Glass Company's works, together with other land then constituting one tract with it, was bought by Capt. D. Z. Brickell, vice-president of said company. He conveyed, before any work was done in the constructing of the works, to Hartuppee, who in turn divided it into three parts, and conveyed to the Chambers & McKee Company the portion on which their works are located, and which also included the land now traversed by Clay avenue extension.

The construction of the factories commenced shortly after this, and the sidings were constructed about the same time, and were made use of during the process of construction of the works.

Prior to the erection of the works a township road (the borough of Jeannette was not then incorporated) traversed the ground now occupied by the buildings. This road was never vacated by any proceeding in court, but a part of the works was erected over it. This road ran parallel, or nearly so, with the Pennsylvania Railroad, and was the only one by which people from Penn and points west of Jeannette reached the latter point.

After the township road was closed up the public for a short time did not follow any well defined line of travel, but travelled the vacant lots then surrounding the works in whatever way they found to be most convenient.

The inconvenience resulting from the closing of the public road led certain citizens residing in the western end of the town of Jeannette to take concerted action for their relief. As a result of their negotiations with the Chambers & McKee Company, the said company agreed to dedicate to public use a thirty-foot street to supply the place of the public road which had been

closed up. In order that this proposed street might reach the point aimed at, it became necessary for the citizens to supplement the right thus given by the Chambers & McKee Company by purchasing a thirty-foot lot from one Peter Gordon. This was done, and the title thereto was afterwards made to the borough of Jeannette. The two acquisitions together constitute what is called "Clay Avenue Extension." Chambers & McKee graded the street. It crossed the switches of the Pennsylvania Railroad Company at grade. Crossing plank were put in and Clay avenue extension has been continuously used ever since as a public street. It, in fact, is the only thoroughfare through which public travel coming up the valley from Penn and points west of Jeannette reach the town last named.

The exact time when Clay avenue extension was opened up to public use does not distinctly appear. An ordinance was passed by the council of Jeannette and signed by the burgess on the 18th of July, 1890, purporting to make Clay avenue extension one of the public streets of the borough. It was opened up to public travel probably in the fall of that same year. The borough has maintained it at public expense continuously since its opening. The public user of it has been obvious and notorious and without the let or hindrance of any one. Both sidings of the complainant company were there and in use prior to the opening of Clay avenue extension, and, although not distinctly appearing from the evidence, it is nevertheless fairly inferable from the testimony of one of complainant's witnesses that the crossings were put in by the railroad company. It does not appear that there were ever any viewers appointed to assess damages; it does not appear whether any damages were ever claimed by the railroad company or whether it ever released damages for the crossing of its switches by Clay avenue extension. It does not appear whether or not the railroad company had any notice of the proposed adoption of the ordinance of July 18, 1890. The borough of Jeannette was incorporated on the 7th of June, 1889, pursuant to the provisions of the general borough act, and Clay avenue extension lies wholly within its limits.

At the time of locating the switches of the Pennsylvania railroad across the land now traversed by Clay avenue extension no written agreement was entered into with the Chambers & McKee Glass Company, the then owners of said land. In 1895 (September 23), an agreement was entered into by the Chambers & McKee Glass Company of the first part, and The Pennsylvania Railroad Company of the second

part, wherein the right of the railroad company to construct and maintain the western switch, and the extent of the user of it, is distinctly defined. By its terms it is provided that the railroad company has the privilege (revocable as stated below) of constructing, maintaining and operating said siding on the glass company's land on the location as shown on the blue print attached (on which attached blue print Clay avenue extension and its intersection with said siding are distinctly set out and marked), for the purpose of loading and unloading cars, and that said company will not use said siding for any other purpose and will not permit any other person or persons to use the same for any purpose whatsoever. This siding is to be kept in repair at the expense of the railroad company. The glass company has the right to terminate the right and privilege given to the railroad company at any time by giving it ninety days' notice of its intention so to do, and the railroad company is then forthwith to remove its property from the property of the glass company. The glass company claims that the railroad company is only entitled to a similar easement for the eastern siding, while the railroad company claims that by an oral agreement made at the time of its construction a conveyance in fee was to be given for it. That dispute is pending and undetermined by the parties to it.

No very serious dispute is now manifest about the existence of the foregoing facts, but counsel for the railroad company contend that they show that Clay avenue extension is *not* a public street of the borough of Jeannette, and that therefore the attempted occupation of it by the trolley company is illegal and without lawful warrant, while counsel for the latter company contend that they show that Clay avenue extension is a public street of said municipality, and that therefore it has the right to occupy said street, and to cross complainant's sidings laid therein, inasmuch as the Act of Assembly under which the trolley company is incorporated has provided that it shall have the right to use the street, with the consent of the local authorities, and "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise."

For appellant, *John G. Johnson and Cyrus E. Woods.*

Contra, James S. Moorhead, W. F. Sadler and Gregg & Potts.

Opinion by MITCHELL, J. Filed July 15, 1896.

These cases depending upon substantially the same facts and the same principles of law, and

having been argued together, may be treated practically as one case for the purposes of this opinion.

The Pennsylvania Railroad Company, complainant and appellant, has failed to make out title to the bridge in question over its right of way. Though constructed and paid for by it the contract with the borough of Greensburg shows that it was so constructed as a part of the public highway, Pennsylvania avenue, and to be maintained as such by the borough. The only open point in the contract was the alternative to the borough that it should in consideration of such erection cause the grade crossing over the railroad at Harrison avenue to be vacated, or failing to do so, should pay the railroad the cost of the bridge. To which alternative the borough is liable does not concern this litigation. In either case the bridge became part of Pennsylvania avenue and the title is in the borough.

The next question is whether Clay avenue extension is a public highway, in such sense as to permit the defendants, in the absence of any right of eminent domain, to cross the sidings of appellant thereon. This is a question mainly of fact, and has been so fully examined by the learned judge below that nothing more need be said than that we see no reason to question the correctness of the conclusion reached by him.

There remain the two really important questions in the case, first, whether the defendant companies have any right to construct or operate railways along the routes or portions of routes in controversy, and secondly, whether the appellant is in position to raise the question of such right.

It is strenuously contended on the part of appellant that the Act of May 14, 1889, P. L. 211, under which the defendants were chartered, gives no authority for the building of a passenger railway through boroughs, or over township or country roads, and especially through private property, but only upon streets, properly and strictly so called. Much reliance is placed upon *Penn'a Railroad Co. v. Montgomery Co. Ry. Co.*, 167 Pa. 62, to sustain this contention. But no such point was involved nor any such decision made in that case. On the contrary, while that proposition if sustained would at once and finally have disposed of the claims of the defendant passenger railway company to its asserted franchise, the decision was pointedly rested upon other grounds. The same may be said of the group of cases decided at the same time, *Lehigh Nav. Co. v. Inter County Ry. Co.*, 167 Pa. 75; *Rahn Township v. Ry. Co.*, 167 Id. 84, and *Tamaqua Street Ry. Co. v. Inter County*

Ry. Co., 167 *Id.* 91; and of *Homestead Street Ry. Co. v. Electric Ry. Co.*, 166 *Id.* 162, and some other cases not necessary to refer to in detail. What *Penn'a Railroad Co. v. Montgomery Co. Ry. Co.* really decides and is authority for is, first, that the laying of railway tracks on a suburban road is an additional servitude which cannot be imposed upon the owner of the fee against his will by the mere consent of the township authorities; and secondly, that the franchise of a street railway passing through several localities is an entirety, and the necessary local or municipal consent for the whole route must be obtained, before it has a right to build any part. In the opinion in that case, and again in *Rahn Township v. Railway Co.*, *supra*, our Brother WILLIAMS reviewed the legislation on street passenger railways, and gave some timely warnings to investors and to the other departments of the government as to the dangers of the investment of capital in lines not within the express authorization of the Act of 1889, and the necessity of further legislation on the subject, in view of the numerous and extended enterprises of the kind in operation or in progress. But the decisions were rested on the propositions above set forth. While no case has yet called for an exact definition of the words "street or highway" in the Act of 1889, or of the limitations in that respect on railways incorporated under that act, it is manifest that the narrow interpretation contended for by appellant cannot be sustained.

It is not necessary to go further in this case, as upon the next question we are of opinion that the appellant is not in position to dispute appellee's rights. The charter covers the route upon which the road is built, and the learned judge below has found that the appellee has the consent of the local authorities, of all the owners of property along the roads occupied and of those through whose property its line passes. To entitle appellant to question the *prima facie* right thus appearing it must show some interest in, or damage to itself, different from that of the general public. It has failed to do so. It is not the owner of the bridge, and the crossing over its right of way is upon a public highway, to all the rightful uses of which its property is subject. The bridge is part of the highway, and the consent of the borough authorities for the laying of the rails must be as effective on it as on any other part, or the borough would hold its municipal power to consent only in subordination to the will of every railroad which the highway happened to cross. The 18th section of the Act of 1889 gives in express terms the right to cross railroads at grade, and *a fortiori* to cross

overhead. In respect to a mere crossing, a railroad is not an abutting landholder to the passenger railway, as the plaintiff was in *Penn'a Railroad Co. v. Montgomery Co. Ry. Co.*, *supra*.

As to the objections to the appellee's route at other points, including the right to occupy township roads, and to buy or secure with the owner's consent a way through private property, the appellant's rights are no different in kind whatever they may be in degree from those of the general public. In regard to the latter objection, it is conceded, as was said in *Rahn Township v. Railway Co.*, 167 Pa. 84, 90, that passenger railways under the Act of 1889 "may diverge for a short distance where the conformation of the surface or the positions of streams make it necessary in order to avoid discomfort or danger to the travelling public," and it may be added to avoid grade crossings, or for any other reason amounting to necessity, or what is the same thing in such matters, great public convenience. The occasion for such divergence and its extent are questions of location, and the decision of them primarily is within the discretion of the railway company. If the variance from the charter route is greater than is necessary, or the charter route itself is open to objection, the Commonwealth alone can be heard to make it in the interest of the general public.

The Act of June 19, 1871, P. L. 1361, affords appellant no standing. No rights of appellant are violated or infringed upon. It is not prevented or interfered with in doing any act that its charter permits. That its interests are affected by a diminution of its passenger traffic is a different thing. It has no monopoly of that traffic, which it holds only by force of superior facilities and convenience to the public, and like any other business, it must take the chances of rivalry and change of methods and customs of travel. The Act of 1871 applies to direct interference with rights, not consequential injury to interests, and the inquiry under it is limited in suits by private parties to the question of the charter right to do the act complained of: *West Penn'a Railroad's Appeal*, 104 Pa. 399. In *Germantown Pass. Ry. Co. v. Citizens' Ry. Co.*, 151 *Id.* 138, cited by appellant, the complainant had a track on Germantown avenue, and its claim to relief was based on the fact that another track on the same street would interfere with its operations.

The appellant did establish one point in which its rights were different from those of the public. The special danger to it and its passengers arising from the use of the bridge for a purpose for which it was not originally built gave appellant a standing to object to such use. It has a clear

right to be protected from that danger. When this case was before some of the justices of this court at chambers on motion for special *superseas*, it was said in denying the motion, that the language of the decree below was not as precise as was desirable, and while it did not probably mean to leave the proper strengthening of the bridge to the uncontrolled discretion of the appellee, it was open to that construction. It was accordingly recommended to the court to amend it so as to leave no doubt that the court's approval should be obtained before cars were actually run. So far as appears this suggestion was not noticed or acted on in any way, and what was then recommended we must now direct.

Appeals dismissed, with costs, but the court below is directed to reinstate the injunction unless within sixty days it shall be made to appear, affirmatively, to the satisfaction of the court, that the bridge has been made safe for continued use by the cars of the respondents.

Superior Court, Penn'a.

JOSEPH V. RICHARDSON.

In an action upon an accepted draft to recover for the price of shipment of rails to the place designated by the defendant, the evidence showed that the contract was based on telegrams by the plaintiff to the defendant offering to sell him a number of tons of thirty-five pounds relaying iron rails for nineteen dollars per ton, to which defendant replied, "Ship the relayers to Jacksonville, Fla., particulars by letter." This letter was to the effect that the defendant understood them to be first class relaying rails, to which the plaintiff replied that they were A No. 1. *Held*, that the contract was not fully completed by the telegrams alone, but that the letters between the parties were part of it and that there was no error in the trial judge charging that "the terms of the sale agreed upon by the parties was that the plaintiff was to furnish the defendant sixty-six tons of thirty-five pounds to the yard, A No. 1 first class relaying rails on board cars for shipment to Ocala, Florida, and it was understood that they were all to be used in laying track for a railway and were not to be 'crap'."

The letter of the plaintiff to the defendant to the effect that the rails were "first class, A No. 1," was a representation of the kind of rails which he undertook to deliver to the defendant and amounted to a warranty of their quality.

In this case the rails were delivered by plaintiff to the defendant's vendee in Florida. At the time of the contract the plaintiff stipulated that he would not answer for any difference the defendant's vendee might find or claim in the rails. *Held*, that the damages amounted to the difference between the value of the rails delivered and the value of the rails to be delivered under the contract, and that the defendant was not entitled to a certificate in his favor for the expenses incurred by him in going to Florida to determine the loss.

Appeal of Isaac Joseph, doing business under

the name and style of Isaac Joseph Iron Company, plaintiff, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* brought against J. H. Richardson, doing business under the name and style of J. H. Richardson & Co., to recover \$747.07 upon an accepted seven days' sight draft for rails sold.

Verdict for defendant, finding him entitled to a certificate for \$209.34.

For appellant, *S. Duffield Mitchell*.

Contra, *A. Leo. Weil* and *C. M. Thorp*.

Opinion by RICE, P. J. Filed July 16, 1896.

1. The proof of the contract out of which this litigation arose consists wholly of letters and telegrams which passed between the parties. The plaintiff, who is a dealer in old rails, scrap-iron and metals at Cincinnati, made an offer to the defendant, who is an iron and steel broker at Pittsburgh, to sell him eighty tons of thirty-five pound relaying iron rails with splice bars attached, for \$19 per ton at Cincinnati, subject to demand draft with bill of lading attached. On July 24, 1894, the defendant telegraphed to reply to this offer: "Ship the relayers to Jacksonville, Fla., and secure us the lowest rate of freight. Our conditions are for quick shipment. Particulars by letter." On the same date the plaintiff replied: "We have your telegram of even date and await your further commands in regard to the iron relayers." We quote these telegrams in full, because it is earnestly argued by the plaintiff's counsel that the defendant's telegram completed the contract, and that any assertion of quality by the plaintiff afterwards, even if it would amount to a warranty had it been made earlier, could not be enforced as a warranty then, because not being a part of the original contract of sale it was based on no consideration. The cases cited sustain the proposition that the warranty must be upon the sale, and that any subsequent or collateral contract of warranty must arise from an express promise to warrant, and that upon a new consideration distinct from that of the sale itself: *Hogins v. Plympton*, 11 Pick. 97; *Summers v. Vaughan*, 35 Ind. 323. It is not necessary to discuss this general rule or the exceptions to it, for it is manifest that it can apply only to a case where the contract is complete, where there has been a full meeting of minds upon all the terms of the contract. To constitute a contract the acceptance of the offer must be absolute and identical with the terms of the offer. If one offers another to do a definite thing, and that other person accepts conditionally, or introduces a new term into the acceptance, his answer is

either a mere expression of willingness to treat, or it is in effect a counter proposal. This is elementary law. Now two things are apparent; first, that the defendant's telegram did not contain all the terms and conditions upon which he accepted the plaintiff's offer; second, that the plaintiff did not understand that it did. They were contained in the letter which was referred to in the telegram, and which the plaintiff awaited. The letter is to be read as if it were a part of the telegram. The two taken together show the terms and conditions upon which the defendant was willing to take the rails. In his letter of the same date the defendant says amongst other things: "Of course we understand these are first class relaying rails and that splice bars are with them. If this arrangement is not satisfactory let us know, but we count on your rails, as we have taken the order. Please hurry the shipment forward as soon as possible." This was the same as saying: "I accept your offer understanding, or upon condition, that they are first class relaying rails." If the plaintiff did not understand his offer in the same way, or if he was not willing to be bound by the defendant's construction of it, or to accede to the latter's terms, treating them as a new proposal, he should have said so. It is said that he might have kept silent and then he would not have been bound by anything contained in the letter. We do not agree to this. Silence under such circumstances would have been equivalent to express assent. The law will not allow a man to make or accept a promise which he knows that the other party understands in a different sense from that in which he understands it himself. But the plaintiff did not keep silent. He wrote in reply: "The rails are all A No. 1 and we have just sold a few days back some of them to a railroad company who were highly pleased with them." Then as if to provide against a contingency to which we shall hereafter refer, he says: "We beg to say that, although we do not anticipate any trouble, we wish to advise you that we will not allow ourselves to be held for any difference your party may find or claim; we know the rails that we are giving you and that they are first class." Here was introduced something into the negotiation that had not been mentioned before, and on the following day the defendant replied: "Replying to your favor of the 25th we note that you say the rails are A No. 1. These people are not hard to please and we are sure if the rails are as you state there will be no complaint, but we want good rails, as we had hard work to get them to take iron, they preferring steel. * * * It is a mining company and if we give them satisfaction they

are going to lay considerable more track and we have a good show to get the orders." This gave the plaintiff distinct notice that the rails were being bought for use and that it was highly material to the defendant that they should be of the kind and quality represented. The plaintiff then replied: "We know the rails to be No. 1, but if there is anyone whom you would like to inspect the rails, it is satisfactory to us." Then, as if for the purpose of showing that inspection would be needless he continues: "They have never been run over, but have been lying awaiting to be laid for some time when the street car company decided to use a heavier section." The defendant did not inspect or have them inspected and subsequently the plaintiff shipped sixty-six tons of rails to Florida as directed.

This is an action on a draft for \$747.07 drawn for part of the price and accepted by the defendant, before he was informed that the rails were not of the kind and quality represented and contracted for in the foregoing negotiations.

In determining what the terms of the contract were we are of opinion that the whole of this correspondence should be taken into consideration but, at all events, it is very clear that it was not a fully completed contract when the defendant's telegram of July 24th was sent and received. The letter following it and the plaintiff's reply are part of the negotiations which led up to the contract and are not mere gratuitous assertions made afterwards. Thus viewing the evidence we hold that the learned judge was clearly right in instructing the jury that "the terms of sale agreed upon by the parties was that the plaintiff was to furnish to the defendant sixty-six tons of thirty-five pounds to the yard, A No. 1, first class relaying rails on board cars for shipment to Ocala, Florida, and it was understood by all that they were to be used in laying track for a railway, and were not for scrap."

2. Having ascertained what the contract was, let us inquire whether there was a breach. As we have seen, the plaintiff delivered iron rails which were used, therefore, it is argued that they were reasonably fit for the use for which they were purchased, and that the jury should have been so instructed. This does not follow. Stress of circumstances may compel a man to use an article which is not reasonably fit for use. There was evidence that the defendant's vendee was under such compulsion. But however that may have been, the fact that the rails could be and were used is not conclusive of the question whether they were reasonably fit for use. There was ample evidence to warrant a jury in

finding—if under the law the question was to be submitted to them—that the rails were not A. No. 1 or first class relaying rails, but were of a much inferior grade, indeed that they were not reasonably fit for use. It is claimed that this was a mere representation of quality and not a warranty; and that therefore in the absence of fraud the defendant was not entitled to damages.

It may be conceded that in the sale of a chattel there is no implied warranty of quality, i. e. the goodness of the thing. The purchaser must use his own judgment, or if he is not willing to use his own judgment, he must see that the terms of the contract secure to him what he wants. If the subject of this contract had been simply iron relaying rails there would have been no implied warranty that they were first class relaying rails. But the plaintiff promised to deliver and the defendant promised to pay for iron relaying rails of a particular grade and quality, known in the market as first class or A No. 1. The defendant endeavored to secure to himself by the terms of the contract the thing he wanted. To say that the terms of this contract were complied with by the delivery of rails of an inferior grade and quality is to ignore the rules of fair dealing which a layman would suppose ought to govern such a transaction, and which fortunately do govern according to numerous decisions of our courts in well considered cases. In *Warren v. Phila. Coal Co.*, 83 Pa. 437, Mr. Justice WOODWARD, after commenting on the common law rule that there is no warranty of quality implied in the sale of a chattel, said: "Nothing in the common law rule on this subject stands in the way of a contract stipulation as to quality between a vendor and purchaser * * * To constitute an express warranty no special form of words is requisite. The word warrant, though it is the one generally used, is not so technical that it may not be supplied by others. It is enough if the words used are not dubious or equivocal, and if it appears from the whole evidence that the affirmant intended to warrant, and did not express a mere matter of judgment or opinion: *Jackson v. Wetherill*, 7 S. & R. 480. A contract to deliver goods of a quality as well as a species defined and fixed is as capable of enforcement as any other contract." Applying the principal to a case where a quantity of ore was sent to be tried and was tried for a specific purpose, was found satisfactory for that purpose, and the plaintiffs agreed to deliver ore of the same quality, Judge TRUNKEY said: "Nothing less fills the measure of the agreement. It is unnecessary to say whether the stipulation is a warranty or condi-

tion, it is a term of the contract and if broken by the plaintiffs they are liable for the breach:" *Mining Co. v. Jones*, 108 Pa. 55. Following in the same line are *Whiteall Mfg. Co. v. Wise*, 119 Pa. 484, where the subject of the sale was a carload of "No. 3 siding," and the lumber delivered was of an inferior grade: *Holt v. Pie*, 120 Pa. 440, where the lumber ordered was "good sound hemlock:" *Halloway v. Jacoby*, 120 Pa. 583, where the defendant offered by letters to sell a carload of corn, and the plaintiff replied: "we will give 53 cents per bushel, provided it is good, salable corn:" *Pratt v. Peele*, 4 Atl. 72, where the subject of the contract was "No. 1 slate free from scabs and graybacks:" *P. & R. C. & I. Co. v. Hoffman*, 4 Atl. 848, where the thing contracted for was "truck bars, quality strictly neutral." All of these cases are considered at length in the case of *Groetzinger v. Kahn*, 165 Pa. 578, where the subject of the negotiations was "thoroughly tanned leather."

All of the authorities agree that there is an implied warranty that the article delivered shall correspond in specie with the commodity sold, unless there are facts and circumstances to show that the purchaser took upon himself the task of determining not only the quality of the article but the kind he purchased. Certainly the contract under consideration would not have been complied with by a delivery of wooden rails or of iron rails that could not be relayed; why should the term "iron" or "relaying" be regarded as any more essentially descriptive of the thing contracted for than the words "first class A No. 1." It was that kind of rails that the plaintiff undertook to deliver and the defendant to pay for. If we are right in holding that this was the undertaking there is no difficulty in distinguishing the cases in which it is held that a warranty is not implied from mere representations of a seller made in praise and commendation of his wares. It is not always easy to draw the line and determine whether a case belongs to that class or to the class of those above cited, but we are clearly of opinion that this case belongs to the latter class and is governed by the principles enunciated in *Warren v. Phila. Coal Co.*, *supra*.

3. Under the circumstances of this case the defendant was not estopped from setting up a claim for damages by his failure to redeliver the rails. Where there is a warranty a redelivery is not necessary: *Borrekins v. Bevan*, 3 R. 23; *Halloway v. Jacoby*, 120 Pa. 583. In a number of instances it has been held that statements descriptive of the subject-matter if intended as a substantive part of the contract will be regarded in the first instance as conditions on the

failure of which the other party may repudiate *in toto*, by a refusal to accept or a return of the article, if that be practicable or if part of the consideration has been received and rescission therefore has become impossible, such representations change their character as conditions and become warranties for the breach of which an action will lie to recover damages. The rule of law is thus stated by WILLIAMS, J., in *Behn v. Burness*, 3 B. & S. 755, as established on principle and sustained by authority: *Wolcott v. Mount*, 36 N. J. L. 282. Where the article has not been returned the measure of damages ordinarily is the difference between the value of the article delivered and the value of the article agreed to be delivered: *Seigworth v. Leffel*, 78 Pa. 476; *Himes v. Kiehl*, 154 *Id.* 190. If the value of the rails agreed to be delivered was \$1,247.07, of which \$500 had been paid, and the actual value of the rails delivered was \$447, the defendant's damages under the general rule above stated would be \$800 and therefore he would have had a complete defense to the suit on the draft for \$747.07 and would have been entitled to a certificate in his favor for \$52.93 with interest. But under the instructions of the court contained in the answer to the defendant's third point, he was allowed to recover in addition the sum of \$139.71, the expenses of his trip to Florida. The learned judge went farther than an affirmance of the point required and said: "Under the circumstances of this transaction and the necessity of a trip to Florida to prevent a total loss, the expenses so incurred ought to be taken into your consideration as a reasonable element of the damages sustained by defendant." This instruction had a tendency to mislead because it seems to assume the necessity of a trip to Florida to prevent a total loss, which under the view of the case most favorable to the defendant was a question of fact for the jury. But how was the plaintiff bound by or affected by the arrangement which defendant made with his vendee? He did not authorize the trip and never promised to pay the expense. His letters of August 24 and August 29 were written after the defendant had of his own volition decided to go to Florida and cannot be construed as a direction to go on the plaintiff's behalf or a promise to pay the expense. Furthermore the plaintiff had expressly stipulated in his letter of July 25, heretofore quoted, that he would not answer for any difference the defendant's vendee might find or claim. He was bound, as we have seen, to make good any difference in value between the rails ordered and the rails delivered, and this under the contract was the extent of his liability. He was careful

to assume no other. He did not warrant that they would be accepted by the defendant's vendee. He dealt only with the defendant and is not responsible for expenses incurred by the latter in adjusting the difference between himself and another. We are of opinion, therefore, that the court erred in permitting the defendant to recover those expenses in addition to the difference in value between the rails contracted for and the rails delivered. The error does not require a reversal of the judgment. It can be corrected by deducting the amount erroneously allowed.

It is argued with much force and plausibility by the appellee's counsel that the warranty is established by the admissions in the pleadings. In the view taken by the court below and by us of the contract as established by the correspondence it is unnecessary to consider that question, and the admission of the evidence specified in the first assignment of error was harmless, even if erroneous.

All of the questions raised by the appeal have been passed on and separate discussion of each assignment of error is not required.

The fifteenth assignment of error is sustained, and the judgment is reduced from \$209.34 to \$57.45 as of February 20, 1896. The other assignments of error are overruled and as thus modified the judgment is affirmed.

WICKHAM, J., dissents, on the ground that there was no sufficient proof of a warranty on the part of the appellant.

Court of Common Pleas No. 3.

GUFFEY v. PITTSBURGH, OAKLAND AND EAST LIBERTY RAILWAY CO et al.

A traction railway company will not be enjoined from constructing its track around the curve of the plaintiff's property at a distance less than eight feet from the curb where the evidence leaves it in doubt whether the tracks can be so constructed as to admit a sufficient driveway for carriages between the track and the curb.

No. 496 Nov. T., 1896. In equity. Motion for preliminary injunction.

Opinion by McCUN, J. Filed October 22, 1896.

As this case is presented to us, even if we were to resolve all other doubtful questions in favor of the plaintiff, we would not be justified, upon a preliminary hearing, in restraining the company defendant from constructing its curve around the corner of plaintiff's property at a less distance than eight feet from the curb; that is, in effect requiring it to now reconstruct the par-

tially laid curve so as to leave an eight foot space, unless it clearly appears that such space will permit a carriage and team to stand with safety at the corner whilst a car is rounding the curve. It can scarcely be contended that this *clearly* appears. At most it appears that the two vehicles might pass with as many inches between them as the hub of the carriage wheel is made to overhang the curb.

An ordinarily skillful driver might be trusted to keep the wheels of his carriage as close to the curb as this implies whilst driving in a straight course, but would probably often fail in an attempt to thus place his carriage upon a curve such as the one we are dealing with. In fact it seems to us very probable that by keeping the wheels of the carriage to the curb, and turning the team so that the heads of the horses would clear the car, a driver would give the front axle a position which would throw the outside front wheel across the line which marks the overhang of the car. At all events we cannot now with safety rest upon the close calculations necessary to show that the carriage and car might pass. In addition to this, we doubt whether, even if there were no car tracks there, a carriage would often be stopped immediately upon this corner, inasmuch as so standing it would block the crossings upon two streets.

It would probably be of some advantage to the general public to have a passage way around this corner, without encountering the car tracks, but even if the advantage were so material as to call for interference, the plaintiff's interest as one of the general public would not support the present bill.

It does not appear that the defendant company has acted arbitrarily or with intent to unnecessarily injure or annoy the plaintiff, and we must refuse to continue the preliminary injunction.

And now, to wit, October 22, 1896, the motion to continue the preliminary injunction is refused, and the injunction heretofore granted is dissolved.

For plaintiff, *Willis F. McCook*.

For defendant, *Geo. C. Wilson and Wm. D. Evans*.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following orders and judgments were filed on Monday, November 9, 1896:

PER CURIAM:

Pender v. Solomon & Ruben. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Ramloch v. Wolf. C. P. No. 2, of Allegheny Co. Judgment affirmed.

Katz v. Johnston. C. P. No. 2, of Allegheny Co. Decree affirmed, and appeal dismissed with costs to be paid by appellant.

Williams v. Guffy & Mellon. C. P. No. 3, of Allegheny Co. Judgment affirmed.

City of McKeesport v. Soles. C. P. No. 2, of Allegheny Co. Judgment affirmed.

National Premium Building and Loan Association v. Seibert. C. P. No. 3, of Allegheny Co. Appeal dismissed at plaintiff's cost, but without prejudice, etc.

Aye et al. v. Brown et al. C. P. of Armstrong Co. Judgment affirmed.

Manross v. Oil City. C. P. of Venango Co. Judgment affirmed.

Lett v. Kunkle & Wilson. C. P. of Westmoreland Co. Judgment affirmed.

Hess v. Berwind-White Coal Mining Company. C. P. of Jefferson Co. Judgment affirmed.

Commonwealth of Pennsylvania, to use of Cambria Co. v. J. G. Lloyd, one of the Commissioners of Cambria Co. C. P. of Cambria Co. (Super. Ct.) Judgment affirmed.

Union Water Company et al. v. The Borough of Rochester et al. Ordered that this cause be set down for hearing in the Eastern District on Saturday, January 9, 1897.

Metzger v. The Borough of Beaver Falls. C. P. of Beaver Co. Reargument refused.

Duff v. McDonough. C. P. No. 1, of Allegheny Co. Allocatur refused.

Hentz v. Borough of Somerset. C. P. of Somerset Co. Special allocatur refused.

In re Disbarment of George C. Kennedy. C. P. of Lancaster Co. Decree affirmed and appeal dismissed at appellant's costs.

The following order in regard to the return day of several counties to the Supreme Court was made:

And now, to wit, November 9, 1896, it is ordered that the return day for the counties of Clarion, Forest, Jefferson, Venango and Westmoreland shall be the second Monday of October, and for the county of Greene the third Monday of October in each year, until further order.

The argument lists shall be called upon the return days as above appointed.

By GREEN, J.:

Hill v. Pennsylvania Railroad Co. C. P. of Northumberland Co. Judgment affirmed.

In re Assignment of James White and wife for the benefit of creditors. *Brown's Appeal*. C. P. of Westmoreland Co. The decree of the court below is affirmed at the cost of the appellant and the record is remitted for further proceedings.

Smith v. City of New Castle. C. P. of Lawrence Co. Judgment reversed and new venire awarded.

By WILLIAMS, J.:

Hayes et al. v. Treat et al., Trustees, etc. C. P. of Washington Co. Judgment reversed and a venire facias de novo awarded.

Reese and Smith v. Wildman. C. P. of Greene Co. Judgment reversed and a venire facias de novo awarded. Dissenting opinion by STERRETT, C. J., in which MITCHELL and FELL, JJ., concur.

By MITCHELL, J.:

Fenn v. Dickey et al. C. P. of Jefferson Co. Judgment affirmed.

Hartzell's Estate. *Hartzell's Appeal*. O. C. of Westmoreland Co. Decree affirmed; costs to be paid by appellant.

Kuhn v. Ogilvie. C. P. of Cambria Co. Judgment affirmed.

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No. 17.

PITTSBURGH, PA., NOVEMBER 18, 1896.

Superior Court, Penn'a.

MARKS v. BAKER.

A. deeds a tract of land to B. with a provision in the deed that A. shall live on the land the rest of his life. A.'s interest is sold at sheriff's sale. *Held*, that A.'s interest is not a life estate such as must be sold under the special provisions of the Act of January 24, 1849.

Appeal of David Baker, defendant, from the judgment of the Court of Common Pleas of Armstrong county, in an action of ejectment brought by John Marks to recover possession of a certain piece of land in Kittanning township, Armstrong county.

On the trial, before RAYBURN, P. J., the following facts appeared: On January 27, 1868, David Baker, the defendant, acquired title to the tract of land in question, and was in possession thereof from that time to the date of trial. On the 4th of March, 1889, David Baker and wife executed and delivered to J. R. Wright a deed in fee-simple for 40 acres of land in Armstrong county, which deed contained the following clause: "Whereas, the said party of the second part agrees that the parties of the first part shall live on the said tract of land the remaining part of their lives, the same to be controlled by the party of the second part." After the making of this deed, to wit, April 28, 1893, John Marks obtained a judgment against David Baker, without a waiver of inquisition, issued *a. fa.* thereon and held an inquisition upon the land in dispute. Said inquisition was without notice to the defendant, and was not approved by the court. A *vend. ex.* was issued without the direction of the court, and without notice to the life tenant, as required by the Act of 24th January, 1849, and the interest of David Baker therein sold to John Marks. On the 25th of April, 1894, John Marks brought his action of ejectment to recover this land.

Under objection by the defendant, the court admitted in evidence, on behalf of the plaintiff, the deed dated January 27, 1868, under which David Baker took title. (First assignment of error.) The defendant offered in evidence the deed of Daniel Baker to J. R. Wright, dated March 4, 1889, containing the clause above set forth, for the purpose of showing that at the

date of the judgment, John Marks against David Baker, the defendant had parted with his title to the land, retaining a life interest only, which was subject to execution only under the Act of January 24, 1849, the terms of which had not been complied with. Objected to. Objection sustained. (Second assignment of error.) The court instructed the jury to find a verdict for the plaintiff. (Third assignment of error.) Whereupon the defendant took this appeal, assigning for error the admission and rejection of evidence as above, and the action of the court in directing a verdict for the plaintiff.

Before the Superior Court, the plaintiff moved to quash the appeal, because, first, the appellant had not filed a bond in the court below, as required by the Act of Assembly June 24, 1895, creating the Superior Court; and second, because the certificate of appeal shows that no bail for the payment of costs was entered by the appellant as required by said act, to perfect the appeal.

For appellant, *W. D. Patton.*

Contra, J. H. McCain and Buffington & Christy.

Opinion by WICKHAM, J. Filed July 16, 1896.

The appellee in this case moves to quash the appeal on the ground that no bail has been given by the appellant to secure the payment of the costs. Section 8 of the Act of June 24, 1895, P. L. 212, creating the Superior Court, provides, that in order to perfect an appeal, and at the same time make it a supersedeas, bail must be given conditioned for the payment of the costs, and also, "whatever judgment or decree may be entered against the appellant, either by the Superior Court or the Supreme Court."

Then follows this provision as to appeals, wherein the appellant does not see fit to go further than to secure the payment of costs: "An appeal from the Common Pleas or Orphans' Court may also be taken without the entry of bail, except for costs, as above provided, if the party appealing or his agent or attorney, files with the prothonotary or clerk of the Orphans' Court an affidavit stating his desire to appeal, and that he does not appeal for the purpose of delay, but because he firmly believes that he has suffered injustice by the judgment, order or decree from which he desires to appeal. The filing of the affidavit and the entry of bail for costs perfects such an appeal, but such an appeal shall only be a supersedeas if the Superior Court, or one of the judges thereof, shall specially so order."

The act, it will be seen, explicitly defines and

prescribes what shall be done to make the appeal complete. It follows necessarily, that until the statutory requirements are fully complied with the proceeding is imperfect and inchoate. There is a marked difference between the language quoted and that of the Act of June 16, 1886, P. L. 762, regarding appeals to the Supreme Court. The latter act merely provides that the writ of error shall not operate to stay execution, unless the required bail is given, thus leaving the common law otherwise unchanged. The Superior Court Act, however, evidently contemplates that in order to render the appeal effectual for any purpose, the costs, at least, must be secured.

We are clearly of the opinion that no appellant is entitled to be heard here on an appeal from the Orphans' Court or Common Pleas unless he has given bail for costs as required by the statute.

We may add, that an examination of the record satisfies us that the appeal, even if regularly taken, is without merit. The appellee, who was the plaintiff in the court below, having a judgment against Baker, the appellant, levied upon the latter's interest in a tract of land which had been in his, the defendant's possession, for thirty or forty years. After inquisition and condemnation a *venditioni exponas* was issued and the land sold, the plaintiff being the purchaser. At the trial the plaintiff offered in evidence certain conveyances, with a view to show the defendant's title. The admission of these deeds in evidence is complained of in the first assignment of error. This evidence was entirely superfluous and neither helped the plaintiff, nor harmed the defendant. The plaintiff having shown the defendant in possession when the writ was issued and served, as well as at the time of the levy and sale, and having also established his title as vendee at the sheriff's sale, might well have rested; he was entitled to step into the shoes of the defendant and to take from the latter his possession and possessory rights: *Young v. Algeo*, 3 W. 223; *Drake v. Brown*, 68 Pa. 223; *Birkbeck v. Kelly*, 19 W. N. C. 422 (not reported in the regular reports); *Gill v. Weston*, 110 Pa. 306. The admission of the deeds could not, therefore, under any circumstances, have amounted to reversible error, but we are satisfied that they were competent evidence, reinforced, as they were, by testimony as to possession and pedigree.

Nor was there error in rejecting the deed of Baker and wife to J. R. Wright, offered in evidence by the defendant. The clause in this conveyance relied on by the appellant to sustain his theory that he had retained a life estate

in the land in suit, and that therefore the sheriff's sale was void, for non-compliance with the Act of January 24, 1849, P. L. 677, reads as follows:

"Whereas the said party of the second part agrees that the parties of the first part shall live on said tract of land the remaining part of their life, the same to be controlled by the party of the second part." The Act of 1849, which requires that the *venditioni exponas* shall only issue by special direction of the court, and after ten days' notice to the defendant, applies, by its terms, only to a life estate, "yielding rents, issues and profits," such as can be subjected to sequestration and not to a nondescript interest like the one under consideration, which is purely personal to the Bakers, not transferable, indefinite save as to time and otherwise lacking in the essentials of a true life estate. The case was governed, therefore, by the general rule, which prevents the defendant, who was in possession at the time of levy and sale, from setting up an outstanding title against the purchaser at the sheriff's sale. This well known rule hardly needs the citation of authorities in its support. Among the cases where it has been either applied or fully recognized are the following: *Young v. Algeo*, *supra*; *Snively v. Wagner*, 3 Pa. 275; *Wetherill v. Curry*, 2 Phila. 98; *Yost v. Brown*, 126 Pa. 92.

Under the evidence, the court did right in directing a verdict for the plaintiff.

Appeal quashed.

HENTZ v. BOROUGH OF SOMERSET.

Plaintiff was injured by falling into a hole in the sidewalk. The hole had been there for over a year and must have been seen by every one passing there. The place was familiar to the plaintiff and one that she passed nearly every day. It was in a lighted part of the street. *Held*, that the plaintiff is guilty of contributory negligence and cannot recover damages from the borough.

Appeal of the Borough of Somerset, defendant, from the judgment of the Court of Common Pleas of Somerset county, in an action of trespass brought by Mary Hentz to recover damages for injuries received, owing to the alleged negligence of the defendant in not keeping a crossing in proper repair.

Upon the trial the following facts appeared:

On the 7th of August, 1893, between 9 and 10 o'clock in the evening, the plaintiff, returning to her home in the west end of Somerset borough, tripped on the east end of one of the planks of a cross-walk, laid across the intersection of a public alley with Main street, and a few moments later stepped into a hole in one of

the planks of this cross-walk at the west end, at which latter point she fell and injured herself by the dislocation of her shoulder. This alley was sixteen feet five inches wide. The length of the cross-walk was the width of the alley. The planks of the cross-walk going westward (next to the west.) The sidewalk at both ends of the cross-walk was at a right angle to it. The ends of this sidewalk were warped, or curled up from two to five inches, and had been in that condition, and the hole had been in the plank for a period of one or two years. The cross-walk was about six feet wide, and the sidewalk at its ends about twelve feet. The ground immediately to the right of the cross-walk going westward (next to the street) was level and smooth and a good, safe place to walk upon, and the ground to the inside not entirely level but perfectly safe to be travelled over.

This cross-walk was on same side of Main street as plaintiff's residence, and between her residence and the churches and business houses of the town. She had lived at that point twenty-one years; was in the habit of coming up the street over this cross-walk constantly, and returning; and was familiar with the alley and the cross-walk, and knew its condition. At the time of the accident, there was an electric light, in the middle of the street, about a block away, the light of which was somewhat obscured by a row of trees along the curbing; and a coal-oil lamp was suspended, a short distance off, about eight feet above the pavement.

Upon this evidence the defendant asked the court to instruct the jury to find a verdict for the defendant. This the court refused to do.

Verdict for plaintiff \$575 and judgment thereon, whereupon the defendant took this appeal, assigning for error the refusal of the court to give binding instructions to the jury.

For appellant, *Kooser & Kooser.*

Contra, Coffroth & Ruppel.

Opinion by REEDER, J. Filed July 16, 1896.

The only question raised by the assignment of error is, was the plaintiff guilty of such contributory negligence, as disclosed by her testimony, as to have made it the duty of the court below to affirm the point submitted by the defendant asking for binding instruction to the jury.

The plaintiff, while walking along the street between 9 and 10 o'clock at night, tripped upon one of the planks of a board street crossing and stumbling into a hole in the board walk some twelve feet from the place where she first tripped, fell and dislocated her shoulder. She knew of the hole being there, had noticed it for some

time previous to her injury, perhaps a year. There was an electric light near the place but the shadow of the trees was thrown upon it. She frequently passed at this point and knew that the board crossing was there. She was not looking at the pavement but "was looking straight ahead." She testifies "I did not look for any object. When I go down the pavement I expect a good pavement." The cross-walk was higher at both ends than the sidewalk, and Mrs. Hicks, one of the plaintiff's witnesses, testified that it had been in this condition for two years. The plaintiff during this time frequently passed over this side walk. Mrs. Hicks says, "Any one could have noticed that the planks were curled up." Dr. Louthier, another of plaintiff's witnesses, testified, "The planks that were laid across the crossing were capped at either end for three or four inches." Viola Weimer, another of plaintiff's witnesses, said, "The ends of the planks stood up three or four inches, anybody going along there in daylight would notice it." The plaintiff lived on the same street, on the same side upon which this crossing was laid. She was accustomed to travelling this pavement for twenty-one years. Yet with this pavement in this condition with which she must have been thoroughly familiar, she approached it without looking or apparently heeding where she stepped, stumbled, fell and sustained this injury.

This testimony, adduced by the plaintiff herself, shows such contributory negligence that the defendant's point asking the court to direct a verdict for the defendant should have been affirmed. It is well established that any one knowing of a defect in a sidewalk, is bound to protect himself from injury because of it, if it can be done by the exercise of ordinary care and prudence, and the absence of such prudence and care is contributory negligence. A greater degree of care, because of the increase of danger, is required in stepping upon all crossings, than in walking along a continuous and uninterrupted sidewalk. The reasonable care which the law exacts, requires travellers on the foot ways of public streets to look where they are going; especially when they are about to step upon the crossing of an intersecting street, where they are bound to expect the continuity, if not the level of the pavement, to be broken: *Robb v. Connellsville Borough*, 173 Pa. 42. In *Dehnhardt v. Philadelphia*, 15 W. N. C. 214, it is said, "The condition of the pavement could have been seen if she had given attention to it * * * the duty of vigilance is as obligatory on the citizens as on the municipality." In *Philadelphia v. Smith*, 23 W. N. C. 242, the Supreme Court held, "that the plaintiff could not recover

if there was negligence on her part in walking without seeing where she was going."

In *Hill v. Tionesta Twp.*, 146 Pa. 11, it was held that one who undertakes to use a public road, knowing that it is unsafe and knowing the defects that make it so, but not choosing to avoid them, although he could do so by taking another road, cannot recover against the township for an injury resulting from such defects. It is useless to continue citing authorities in support of such well established principles of law. This defect was patent not latent. It was as apparent to her as it was to every other citizen of that community. She had used this street for twenty-one years and for two years prior to the injury it was as defective as it was the night the injury occurred, and this was as apparent to her as it was to any other passer-by, yet she not only passes over this defective part of the street at night, when she could have passed on either side of it or upon the other side of the street, but she does so without looking at, or thinking of the defective sidewalk.

There can be no doubt that this is contributory negligence. *Judgment reversed.*

HARTMAN v. PITTSBURGH INCLINE PLANE COMPANY.

In an action to recover damages for the continuance of a nuisance, a judgment for the plaintiff in a former action in which the same matter was in controversy between the parties, is conclusive evidence of the existence of the nuisance, and this rule extends to every question in the proceeding which was legally cognizable.

In a second action to recover damages for the continuing loss resulting from a nuisance, it is not error to admit the record of the first action, though the statement in the first action contains a claim for consequential damages which the statement in the second does not, if it appears that it was decided in the first action that no claim could be maintained for consequential damages.

Appeal of the Pittsburgh Incline Plane Company, defendant, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action of trespass, wherein Marianne Hartman was plaintiff.

This was an action to recover damages for a nuisance. A prior action had been tried between the same parties for the same cause. The statement in the present was the same as that in the prior action, omitting a claim for consequential damages, which had been held in the first action not to be maintainable. The other facts of the case are set forth in the opinion of the court.

The court admitted the record of the former suit, overruling the objection of defendant. Verdict for plaintiff, \$613.36, and judgment thereon.

The defendant took this appeal, assigning as error, *inter alia*, the admission of the record of the prior action.

For appellant, *A. M. Imbrie and A. W. Duff. Contra, William Yost.*

Opinion by REEDER, J. Filed July 16, 1896.

Marianne Hartman, the plaintiff, has a life interest in a property of the full use and enjoyment of which she claims she is deprived by the construction by the defendant of its incline plane upon adjoining land. A similar action was tried before in Allegheny county between the same parties, and upon the same trial a compulsory nonsuit was entered. The Supreme Court upon appeal reversed the judgment: *Hartman v. Incline Plane Co.*, 159 Pa. 442. The case was subsequently called for trial in the court below, a jury sworn and all the witnesses for the plaintiff examined, when the defendant tendered a judgment for the amount of the plaintiff's claim. This action was at once brought for the continuing loss to her. The defendant assigns for error the admission in evidence by the court below of the record in the former trial, claiming that there was a variance between the statements of claim in that case and in this, inasmuch as in the first case the statement claimed consequential damages and this statement does not, and therefore the causes of action are not the same. When the case was before the Supreme Court it was held that there could be no recovery for the consequential damages, and therefore that portion of the plaintiff's claim was eliminated from consideration upon the retrial of the cause. The remaining assignments of error all relate to the action of the court below in holding that the negligence of the defendant's structure and the liability therefor were determined in the first suit, and the finding of the jury in that action is conclusive. This is such a well settled doctrine in this State that it is no longer open to controversy. As early as 1828, in *Kilheffer v. Herr*, 17 S. & R. 319, it was decided that "in an action upon the case for the continuance of a nuisance in erecting a dam a verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, are conclusive evidence as to the existence of the nuisance." This has been followed in a long line of cases. Even as recently as *Schwan v. Kelly*, 173 Pa. 71, the Supreme Court have said: "The rule that what has been judicially determined shall not again be made the subject of controversy, extends to every question in the proceedings which was legally cognizable." It is said by the appellant in its argument that it does not

dispute this well established doctrine, but contends that the judgment according to the record in the first trial, does not legally show a claim for a nuisance, and is therefore not conclusive as to its existence. We do not see any force in this contention. The plaintiff claims that the defendant's structure was so imperfectly and negligently built as in the one case to throw water from the overhead structure upon the side of her building, and in the other by building its masonry against the plaintiff's wall, so as to keep her house damp and make certain of her rooms untenable. This is the nuisance for which she claims damages in both actions. The finding of the jury in the first action that there was a negligent and faulty structure, was therefore conclusive in this, and the action of the court was proper in withdrawing that fact from the consideration of the jury. We have already said in the first part of this opinion that the variance between the first and second statement in that there was a claim for consequential damages in the first which was omitted in the second statement is immaterial, as that question was eliminated from consideration in this case by the decision of the Supreme Court in the first case between these parties. The action of the court in a second trial as to the conclusiveness of facts found in a prior trial between the parties is to be governed by the facts as submitted to and found by the jury, and not by the claims contained in the statement.

Judgment affirmed.

Orphans' Court.

In re Estate of F. M. MAGEE, Deceased.

Where F. discounted a note in good faith for value, before maturity, it is not a valid defense by M., an accommodation indorser, that the note, while kept in an insecure place, was stolen from him by O., who had the note discounted.

Opinion by HAWKINS, P. J. Filed November 7, 1896.

There are two contested claims in this estate—one by the Real Estate L. & T. Co., for use of E. Winter, on a note for thirty-three hundred dollars, with the name of F. M. Magee, indorsed and negotiated by T. O'Leary, Jr., which was alleged to be a forgery; and the other by G. S. Fleming on two notes for seven hundred and fifty dollars each with the same indorser, and also negotiated by T. O'Leary, Jr., which were alleged to have been stolen.

(1) On comparison with a large number of admittedly genuine signatures this court is sat-

isfied that the indorsement of the note held by the S. F. Bank is genuine.

(2) T. O'Leary, Jr., who was called in support of the Fleming claim, testified that these notes were indorsed by Mr. Magee, for his accommodation, and one was discounted by Mr. Fleming in consideration that the other should be credited on an antecedent debt; and F. Wickman, the drawer of these notes, called on behalf of the estate, testified they were indorsed for his accommodation, and that T. O'Leary, Jr., had admitted he had gotten control of them without Mr. Magee's knowledge. Mr. Magee was at the time recovering from a serious illness; one of these witnesses was a frequent visitor, and the other was the resident nurse. Both witnesses were discredited, but in the view which this court takes it is not necessary to decide between them. The burthen of proof being on the estate, and witness against witness, the defense, even on the theory of its counsel as to the law, has failed; but assuming that the notes were taken without authority, it does not seem just that Mr. Fleming, who is a *bona fide* holder for value, *Bardsley v. Delp*, 88 Pa. 420, should suffer. The genuineness of signature was admitted; and when made, the notes do not seem to have been kept in a place of ordinary security. Taking the most charitable view of the evidence there is no doubt Mr. Magee's great kindness of heart and trustfulness were taken advantage of to his hurt; but Mr. Fleming was in no sense a party to this. The later decisions have set in strongly in favor of the principle that nothing but clear evidence of knowledge, or notice, fraud, or bad faith, can impeach the *prima facie* title of a holder of negotiable paper taken for value before maturity: *Lerch Hardware Co. v. Bank*, 109 Pa. 240. In *Connor v. Fifth National Bank*, 31 PITTSBURGH LEGAL JOURNAL, 370, this doctrine was carried to the extent of holding that even the title of a purchaser to corporation bonds payable to bearer is unaffected by want of title in the vendor; and in *McSparran v. Neely*, 91 Pa. 1, it was held that nothing but bad faith was a defense as against a purchaser for value before maturity of a note. By habitual indorsement, such as existed here, encouragement is given to belief in its continuance, and to credit: *Tanner v. Hall*, 1 Pa. 417; and he who indorses his name in blank on negotiable paper, however innocent of intention to do a wrong—and Mr. Magee was certainly innocent—affords a means of ready imposition; and as between him and another equally innocent of intended wrong, ought in justice to bear the loss which results. Stern adherence to this principle is essential to the commerce of the

country, however hard its operation may be in particular cases: *Moorhead v. Gilmore*, 77 Pa. 118.

For accountant, *W. B. Rodgers*.

For Fleming, *Henry A. Davis*.

For Real Estate L. & T. Co., *Willis F. McCook* and *Ed. G. Hartje*.

Court of Quarter Sessions.

MERCER COUNTY.

COMMONWEALTH v. BALPH.

A person cannot be convicted of the statutory crime of false pretense if it appear that the goods which it is alleged the defendant obtained by false pretenses were to be delivered, according to the special agreement between prosecutor and defendant, in a county other than the one in which the prosecution was instituted.

No. 27 Jan'y Sess., 1896. Charge to the jury on an indictment for cheating by false pretenses.

For plaintiff, *McClure & Son, W. H. Cochran* and *Winternitz & McConahy*.

Contra, *M. McConnell* and *Q. A. Gordon*.

Opinion by WALLACE, P. J., 53d District, specially presiding.

Gentlemen of the Jury.—The case which you have been sworn to try and a true verdict render according to the evidence, is the case of the *Com'th v. D. F. Balph*, wherein he stands indicted on the charge of cheating by false pretenses. This charge is based and the indictment drawn by reason of an Act of Assembly, which reads as follows: "If any person shall by any false pretense obtain the signature of any person to any written instrument, or shall obtain from any other person any chattel, money or valuable property with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor."

Upon this act this indictment has been drawn, and you, gentlemen, are to well and truly try the issue wherein the Commonwealth is plaintiff and D. F. Balph defendant. You are not trying the defendant for any other charge than that of obtaining this particular iron or pig metal by false pretense at that particular time. He is not here defendant against his general creditors, neither is he here in any civil action; he is here alone defendant in the case upon which this indictment has been drawn and a true bill found. You will cast aside all prejudice, all feeling, and decide this case according to the evidence. And when we say according to the evidence, we may as well add that in construing the testimony you have a right to consider the actions of the defendant or the prose-

cutor, or the witnesses during the trial, that for the purpose of affecting their credibility, none other. It is incumbent upon the Commonwealth to convince you, beyond a reasonable doubt, of the essentials necessary to make up this crime. The defendant stands before you innocent. The Commonwealth seeks to convict nobody except by clear and satisfactory evidence; and until you are satisfied by clear and satisfactory evidence, beyond a reasonable doubt, of the essentials as we shall undertake to lay them down to you that go to make up this crime, you would not find the defendant guilty.

This case as it is before you comes in a two-fold manner. There are two questions for you to pass upon and dispose of. The first is whether or not this court has jurisdiction of this case, and that depends upon your findings; and there are questions you must consider under that head. If you find that a contract was made and that a delivery was to be and was made in the county of Lawrence, in the city of New Castle, then your verdict should be not guilty, because this court would have no jurisdiction. The gist of this offense is in the delivery, and where the delivery is made there the jurisdiction is. If it was not made in Mercer county, then we have no jurisdiction. On that phase of the case you will take the testimony of Mr. Goldburg and his witnesses, you will remember their names, the court will not undertake to review them. You will take their testimony and take the testimony of Mr. Goldburg when he visited New Castle, and the testimony of Mr. Balph as to his visit to Mr. Goldburg. Follow them through with the visit to Sharon and then go back and consider the statements made by Mr. Goldburg in New Castle and the statements made by Mr. Balph in New Castle. And from those statements and conversations, because the considerations were the contract if any was made, find whether or not they did make a contract whereby Mr. Goldburg was to deliver a certain amount of pig iron or metal to the Keystone Plow Company, Limited, in the city of New Castle, or not. That appears to be the starting-point of this case. If you find there was a conclusive contract made there that day, and by reason of that contract this metal was delivered in the city of New Castle, then you need go no further, and should render a verdict of not guilty.

The only question then for your disposal would be the one of costs. If you find that the contract was not made in the city of New Castle, and that the conversation there was only a conversation which led to the original contract, and that the contract was actually made in the town

of Sharon in Mercer county, upon the visit of Mr. Balph to Sharon, and that while in Sharon he then and there made and concluded the contract, and by reason of the conversation in Sharon this metal was delivered, mark what I say, this metal was delivered upon the cars without any mention of delivery at New Castle, although the Keystone Plow Works is in the city of New Castle, a delivery to a common carrier at the town of Sharon would be a delivery to the Keystone Plow Works, and if you so find, then this court would have jurisdiction. But if you find that the contract was made in the town or borough of Sharon, and also find that although made in Sharon it was a special agreement between the parties that the delivery was to take place in the city of New Castle, and, gentlemen, mark the distinction, if it was delivered there to be shipped to New Castle and without any special agreement as to the delivery, then we have jurisdiction. If there was a special agreement to deliver in the city of New Castle, and the delivery was made by reason of the special agreement to deliver in the city of New Castle, then we would have no jurisdiction, and your verdict in that case should be for the defendant. Now, these questions are for you to determine, and in the consideration and determination of them you are to be satisfied beyond a reasonable doubt; and if there arises a reasonable doubt give the defendant the benefit of that doubt, and acquit him.

If you find that this contract was made and the delivery to be in Sharon, then you go to the other phase of the case. And that brings us to the merits of the case, as charged in the indictment, the obtaining of goods by false pretense. And in considering that question we have separated the essentials, and will put them to you as questions for your determination. And if, in your consideration of the testimony in this case, carefully weighing on one side and on the other, you are satisfied beyond a reasonable doubt of each and all of these essentials, then your verdict would be guilty. If there arises in your minds a doubt as to any one of these essentials, then your verdict should be not guilty.

In order to make out the crime of false pretense you must first find whether the representations alleged to have been made were made, and made by this defendant. That is the first step. Then if you so find, you take another step, and determine whether or not they were false. If you find they were made and that they were false, then you go to the next inquiry, Did the defendant know they were false? And this question is put to you because an answer to this question determines

the very element of the crime of which the defendant stands charged. The defendant must have known the alleged representations to be false, because the intention to defraud is the very basis upon which this act is drawn. If he did not know that the statements he was making were false, or if he made the statements and honestly believed they were true, he could not be convicted. But if he knew when he made these statements that they were false, then that gives you his intention. And if you find that element against him, were they made with intent to defraud the complainant, that leads to the same question, and they might have been put together, but we thought best to separate them. Did he make them with the intent to defraud? You are to judge this from the testimony given you from the witness-stand. Then, if you find this, you go to the next and last question, Was Mr. Goldberg defrauded by reason of relying upon these statements? And in considering that you might ask yourselves the question, Would Mr. Goldberg have sold or shipped this metal had he not asked this question of Mr. Balph, which he alleges he did ask, as to his standing? If he would have shipped it without making that inquiry then he was not relying upon those statements for his shipment.

In considering these elements you will take up and weigh the testimony. Take the evidence of Mr. Goldberg, take his story as he tells it. Is it reasonable, is it true? Take the stories of the witnesses that follow one after the other; is their story reasonable? Is their memory such as you would believe the testimony given by them to be true? Because, when a witness testifies, the attorneys on the opposite side have a right to ask as to the other matters pertaining to the particular circumstances surrounding him at the time the statements were made and the matters of which he is testifying, in order to affect his credibility. You will consider the credibility of the witness, and if you find any witness willfully and knowingly testifying falsely as to any one material part of his testimony, then discard it all, because if it is false in one part it is false in all, and should have no weight whatever.

For the defendant you have the testimony of himself. If you believe the story of the defendant, there was a contract in the city of New Castle, and the delivery was there. And, as we have said, if that is true this court has no jurisdiction and your verdict should be for the defendant. You saw the defendant upon the witness-stand; you heard him testify; you have a right to take into consideration his actions on the witness-stand and his actions during the

trial; this for the purpose of affecting the credibility of that witness. Mr. Balph is the only witness on the one side, and you will remember, gentlemen, too, that he is the defendant. He has some interest; the fact he is a defendant would also affect his credibility somewhat, the amount is for you.

He is supported by twelve men who testify as to his reputation. When twelve men, or any number of men, are called to prove a man's reputation for truth and honesty to be good, that has some weight. It is substantial evidence. It is such evidence in which there have been cases it would raise a reasonable doubt. It can and may raise a doubt in itself; it is for you to consider. You could not ignore the testimony given by the witnesses here as to Mr. Balph's character. The evidence of men of good moral character should be considered with more weight than that of men who are not as reputable.

There is another phase of this case we almost overlooked. If you find that this metal was shipped, and that more or different metal was shipped to the city of New Castle, and that after it was shipped, by reason of a notice of Mr. Balph to Mr. Goldburg he came over, and while there he and Mr. Balph made a new arrangement—new contract while these goods were in the city of New Castle in that car—a different contract from the first, then that would be a new transaction, and your verdict should be not guilty. If you find a verdict of not guilty by reason of the delivery being made in the city of New Castle, Lawrence county, that would end the case, and you should not place any of the costs upon the defendant. But, should you find a verdict of not guilty upon the merits of the case, after you have passed upon the questions spoken of, and find jurisdiction, then you must dispose of the costs. You can dispose of the costs anyhow, but the defendant would be out of it if we had no jurisdiction. But if you find we have jurisdiction, then you can place the costs upon the defendant or upon the prosecutor, or you can place them upon both in such proportions as you see fit, in each case naming the defendant and the prosecutor and the proportionate share that they should pay. Or you can place them upon the county. If you place them upon the county you should name the county of Mercer, and it pays the costs of the Commonwealth alone. You should not place the costs upon the prosecutor unless you believe that the information was made in bad faith and from some bad motive. If you find that, then that would be the proper place for the costs.

Gentlemen, take the case, weigh it; reconcile

this testimony if you can, and where your conscience leads you there let your verdict be, and your duty ends. *Verdict, not guilty.*

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Western District.

The following orders and judgments were filed on Wednesday, November 11, 1896:

PER CURIAM:

Aufderhelde v. Schroeder et al. C. P. No. 1, of Allegheny Co. Decree affirmed and appeal dismissed at the cost of the appellants.

Ralston, Administrator, v. Truesdell. C. P. of Washington Co. Judgment affirmed.

McClane v. The Peoples' Light and Heat Co. C. P. of Washington Co. Judgment affirmed.

Estate of Mary E. Noble, Minor, etc. James H. Irwin's Appeal. O. C. of Allegheny Co. Decree is affirmed and appeal dismissed at appellant's costs.

Estate of George G. Jeremy. Theodore R. Jeremy's Appeal. O. C. of Allegheny Co. The decree is affirmed and appeal dismissed at appellant's costs.

P. Duff & Sons v. Peoria Grape Sugar Co. C. P. No. 3, of Allegheny Co. The justices before whom this case was heard being equally divided in opinion, it is ordered that the judgment stand affirmed.

Harrington Bros. v. Florence Oil Co. C. P. No. 3, of Allegheny Co. Decree affirmed and appeal dismissed at appellant's costs.

Buchanan v. Supreme Conclave Improved Order of Heptasophs. C. P. No. 1, of Allegheny Co. Judgment affirmed.

Estate of Charles Bryant, Deceased. Reargument allowed as to claim of George Lodge; case to be placed at head of list for Philadelphia at January Term, 1897.

By STERRETT, C. J.:

Caldwell v. Snyder et al. C. P. of Armstrong Co. Decree reversed with costs to be paid by the appellees, and record remitted with a procedendo.

By WILLIAMS, J.: (Filed Nov. 9, 1896.)

In re Change of Grade of Woodland Avenue. Appeal of the City of Allegheny. C. P. No. 3, of Allegheny Co. The judgment is affirmed.

By McCOLLUM, J.:

Van Steuben v. The Central Railroad of New Jersey. C. P. of Northampton Co. Judgment reversed and venire facias de novo awarded.

Ferguson Bros. v. The Anglo-American Telegraph Co. C. P. No. 2, of Philadelphia Co. Judgment affirmed.

Sopherstein v. Bartels. C. P. of Luzerne Co. Judgment affirmed.

Nuss v. Rafsnyder. C. P. No. 4, of Philadelphia Co. Judgment reversed.

Keely et al. v. Hartranft. C. P. No. 4, of Philadelphia Co. Decree reversed at the cost of the appellant, and record remitted with direction to state an account and enter same in accordance with this opinion.

By FELL, J.:

Commonwealth v. Shaffer. O. & T. of Luzerne Co. The judgment is affirmed, and the record is remitted in order that the sentence may be carried into execution according to law.

Estate of Ruth Martin. Appeal of E. M. Sayers. O. C. of Greene Co. The order of the court of December 31, 1895, is reversed and set aside, and the record is remitted in order that distribution may be made in accordance with this opinion.

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No. 18.

PITTSBURGH, PA., NOVEMBER 25, 1896.

Supreme Court, Penn'a.**LONG v. HARVEY.**

In disputes between warring church factions, the courts can look only into the rules of the church to ascertain the church law, and if that be not in conflict with the laws of the land they will enforce that law as between the parties.

A majority in a church organization must exercise whatever right of control it has in conformity with the rules of the organization.

Where by the laws of a religious body each congregation is independent of all other congregations of the same body, if a majority of a congregation call in the aid of members or officers of such other congregations, and acting with them, assumes to depose officers of said congregation who are supported by a minority thereof and to elect others, such action is illegal, and equity will not aid the persons chosen by the majority to exercise offices so conferred upon them, nor put them in possession of the church property.

Appeal of H. L. Harvey, A. W. Gardner, A. J. Gardner and R. C. Leathers, defendants, from the decree of the Court of Common Pleas of Centre county, in a suit in equity brought by J. Z. Long and others, trustees and elders of the Disciple Church at Eagleville, and Farley Stout and Orin T. Noble, elders of the Disciple Church at Lock Haven.

The pleadings, facts and decree in this case are stated in the opinion of the Supreme Court, *infra*.

For appellants, *Ira C. Mitchell and C. P. Hewes.*

Contra, Wilbur F. Reeder.

Opinion by DEAN, J. Filed October 5, 1896.

The plaintiffs' bill in this case avers as follows: In 1832, a religious association or congregation was organized at Howard, Centre county, Pennsylvania, denominated "Disciples of Christ;" at the commencement of these proceedings it numbered sixty persons, and was not incorporated; one R. C. Leathers made a report to the Pennsylvania conference for the year 1889, that there were but fifteen members in good standing composing the congregation; that this report dropped from the rolls of the congregation a majority of its members without notice or hearing, and without warrant. On February 7, 1890, the majority appealed to an impartial tribunal

(not named) and asked the elders to join in choosing said tribunal, which they, the elders, refused to do; then, a majority of the congregation, acting through a committee, appealed to the elders of a sister church at Eagleville to hear and determine the complaint which had created schism; the elders of the Eagleville Church entertained the appeal, and called in elders of the sister congregations of Lock Haven and Williamsport, and together they heard the complaint on June 13, 1890, and rendered a decision, recommending the calling of a meeting of the congregation at Howard on June 25, 1890, following; due notice of the meeting was given; on the day named, defendants closed and locked the doors of the church, and prevented the meeting in the church; those members who had complained and appealed, then organized a meeting outside and in front of the church, presided over by Rev. Ryan, of Williamsport; at this meeting, J. Z. Long, one of plaintiffs, was elected a trustee in place of H. L. Harvey, then a trustee, and one of these defendants; N. G. Pletcher, theretofore and then a trustee, and one of the plaintiffs, was approved, as was also A. J. Gardner, one of the defendants; A. J. Gardner and R. C. Leathers were deposed as elders, and the congregation, for the time being, was placed under the supervision and jurisdiction of the elders of Eagleville and Lock Haven. Notwithstanding their deposition, the old board of trustees continued to act, and the old board of elders persisted in holding on to their offices, and by force and violent demeanor prevented the elders of Eagleville and Lock Haven churches from assuming and exercising the jurisdiction and supervision conferred upon them by the 25th of June meeting, and persisted by force and threats to debar a majority of the congregation from engaging in worship in the church. That the 25th of June meeting was constituted and held by competent authority of the denomination, and all its proceedings were regular under the usages of the church, and that the exercise of authority by defendants was wrongful. The prayers of relief were: That Harvey, the two Gardners and Leathers, be enjoined from acting as trustees or elders and from preventing Long and Pletcher from assuming the offices to which they had been elected, and that they be further enjoined from preventing the elders of Eagleville and Lock Haven from assuming supervision of the congregation. And further, that they and each of them be enjoined from excluding a majority of the congregation from worshipping in the church.

The answer of defendants denies that those who appealed, called on the elders of the Eagle-

ville and Lock Haven churches, and held the meeting of June 25, are a majority of the congregation; on the contrary, avers that they compose but a small minority; that O. T. Noble and A. M. DeHass, neither of them members of the congregation, but acting as a committee for the meeting, attempted to take possession of the church property, and turn it over to a minority composing the meeting; thus ousting the regular organization and putting a wholly irregular one in control; they admit they resisted this unauthorized interference; they further aver that one Rev. W. L. Hayden, of Bellefonte, came with the sheriff at the hour of public worship, on the tenth of August following the meeting, and read a lecture or proclamation to them, commanding them to surrender possession of the church to the minority, which they refused to do. They further aver that the action of the 25th of June meeting, with the elders of the churches of Eagleville and Lock Haven, and clergymen from other congregations, was wholly unauthorized, and unknown to the rules and discipline of the church; that there exists no other power to adjust differences in a Disciple's congregation but the elders and the congregation, and the congregation alone can depose officers duly elected. That this was a regular and fully organized congregation, with a duly elected pastor, Rev. G. W. Headley; that the defendants, the duly elected officers representing a majority of the congregation, do not exclude any, but invite all the members to worship in said church. They therefore pray that the bill be dismissed at plaintiffs' costs.

The court appointed the late D. S. Keller, Esq., master to report facts and suggest decree; he took much testimony, and heard full argument by counsel, but died before reporting to the court. Clement Dale, Esq., was appointed in his stead, who without hearing the argument made report; he suggested for decree, that defendants be enjoined from acting as officers, or otherwise interfering with the occupation of the church, and that some person be appointed to give two weeks' notice of a congregational meeting of the members now in good standing, for the purpose of electing two elders, three deacons and three trustees to serve for two years, and thereafter the elections to be conducted according to the usages of the church; the same person appointed to give notice, to preside at the election; after the election, the terms of the present incumbents' office to end. The president judge approved the report of the master made in substance the decree suggested by him, and appointed A. M. DeHaas, one who sided with plaintiffs, to give notice and preside at the

meeting of the congregation. The two associate judges filed a dissenting opinion, dismissing the bill at the costs of plaintiffs. We have before us now, the appeal from the decree of the president judge awarding the injunction.

Our power of adjudication in disputes between warring church parties is limited. In such cases, we can look into the rules of a church organization only to ascertain the church law, and if that be not in conflict with the law of the land, all we can do is to protect the rights of parties under the law they have made for themselves. Our Brother WILLIAMS has so fully discussed this subject, and has so clearly stated the rules that must govern courts in such litigation in the late case of *Krecker v. Shirey*, 163 Pa. 551, that we need not repeat them.

Each party here claims to be a majority; when this trouble arose the defendants were in office; presumably, they were put there by a majority, and there is no evidence even offered to rebut this presumption. It is admitted, their term of office was indefinite, and they could only be deposed by a majority of the members. Assuming, that a majority of the members demand the removal of these officers, what method should they legally adopt to effect their purpose? The law is settled, that it must be done in compliance with the rules and discipline of the church. "A majority of a church organization may direct and control church matters consistently with the particular and general laws of the organization or denomination to which it belongs, but not in violation of them:" *Sutter v. The Church*, 42 Pa. 508. The master finds as a fact, that every Disciples congregation is practically independent; other congregations of the same denomination may advise, but there is no superior tribunal of appeal. Both parties concede, that they recognize no rule of conduct in cases of dispute except the New Testament. Alexander Campbell, the Disciples' greatest preacher, if not their founder, says, "It (the church) knows nothing of superior or inferior church judicatures, and acknowledges no laws, no canons of government, other than that of the Monarch of the universe and its laws." Daniel Sommer, an authority in the church, discusses the whole subject, and while he favors an appeal to other churches for advice and aid in allaying church dissensions, he comes to this conclusion: "The question is often asked, have we no right to appeal from the decision of a church? Certainly, the right of appeal is as free as the air we breathe. For our own justification, we may appeal to one church or a dozen, to one man or a hundred. But among religious people, who are strictly congregational in their

church government, there is no authority in any tribunal that may be thus selected, especially a tribunal chosen by only one party. The decision of such a tribunal may have a moral weight, but it has no legal authority. There is nothing official about committees, even if mutually chosen. * * * As each family is a separate government by itself, so is each congregation. No other family on earth has a right to come in and dictate to me and my family, and no other congregation on earth has the right to come in and dictate with reference to the affairs of the congregation where I hold my membership."

Many other authorities were put in evidence before the master; the decided weight of them tends to establish the rule in this particular denomination, that each congregation is absolutely independent of any legal control by any other congregation, or by the clergy or officers of such other congregation. What are the admitted facts here? Against the protests of defendants, delegations from Eagleville and Lock Haven churches, two ministers, one from Bellefonte and one from Williamsport, met with members of this congregation outside the church, and by a vote deposed these defendants and elected in their places part of these plaintiffs, and approved and continued in office part of them. Where, in the rules of the church organization, exists the semblance of authority for this proceeding? The master does not point it out, and we have failed to find it in the evidence. It is said that Leathers and one of the Gardners were present at one of the hearings before the 25th of June, and had notice of the meeting; this is denied; but assume it to be true, both objected to the meeting when held, and refused to take part. We decline to consider the arguments bearing on the fairness and desire for peace displayed by the respective parties; discussion of this subject would neither determine the existence of authority in the meeting nor the want of it. In the exercise of such a high authority as was attempted here, parties must point us to a clear "thus saith our church law." We are of opinion the meeting of June 25th, was wholly without authority to depose the old officers or to elect new ones.

But, it is asked, if the members represented by these plaintiffs be in a majority, how shall they obtain the rights of a majority? We reply, by exercising them as members of the congregation, and as the majority for more than sixty years has exercised them; the reply to this, perhaps, is, those in possession will exclude us from lawful participation in congregational government. We are averse to assuming that any of the members of this congrega-

tion, now that their lawful course of action is pointed out to them, will act with lawlessness; but if peace among members of a Christian church be impossible, then the courts are open to the wronged members, as members, and such remedy as the law warrants will be afforded. But the courts cannot sustain wholly unlawful attempts to right even wrongs.

The decree of the court below is reversed and set aside, and the bill is dismissed at the costs of plaintiff.

Court of Quarter Sessions.

LAWRENCE COUNTY.

COMMONWEALTH v. LIVINGSTON.

An indictment charged the larceny of goods belonging to A. The evidence showed that the goods belonged to A. and B. The district-attorney was allowed to amend the indictment accordingly and a conviction thereunder was sustained.

Remarks of counsel to the jury are not ground for a new trial unless they are noted at the time by the official stenographer and an exception then taken to them.

No. 48 Dec. Sess., 1895. Indictment for larceny. Motion for new trial in arrest of judgment.

For motion, *Winternitz & McConahy* and *B. C. Martin*.

Contra, *Robert K. Aiken*, District-Attorney.

Opinion by *WALLACE*, P. J. Filed August 17, 1896.

Max. Livingston, the defendant in this case, was indicted for larceny and receiving stolen goods, knowing them to have been feloniously stolen, etc. On December 16, 1895, the defendant pleaded not guilty, the jury were sworn and the case went to trial. The Commonwealth called several witnesses. After the Commonwealth rested, the defendant, by his attorney, Mr. Winternitz, stated to the court there could be no conviction in this case, for the reason that the owner of the property named in the indictment is J. M. Armstrong, when, in fact, the owners were Armstrong and Stohl, and as the proof did not correspond with the indictment, no conviction could be had. This the court refused to say to the jury, and directed them to open their case for the defense.

After the defense closed their testimony, the district-attorney, in behalf of the Commonwealth, asked leave to amend the indictment and insert the name of Thomas Stohl as one of the owners of the property, which motion was permitted by the court. (See notes of testi-

mony.) The defendant then asked the court to charge the jury, that, in this case, under the evidence, there could be no conviction, which point the court refused. The case was submitted to the jury, and a verdict of guilty in manner and form as indicted; whereupon the attorney for the defendant moved the court to arrest the judgment in the above stated case for the following reasons:

1. The remarks of the district-attorney, in summing up to the jury, were of the most offensive and reprehensive character, not sustained by any evidence in the case, and calculated to arouse the prejudice of the jury.

2. The proofs in the case did not support, or even have a tendency to support, the allegation in the indictment, "that the property alleged to have been stolen was the property of J. M. Armstrong."

3. All the proofs and evidence in the case were positive that the property alleged to have been stolen was not the property of J. M. Armstrong, who was named in the indictment as the owner.

4. The court erred in refusing the defendant's point, which was, that, under all the evidence in this case, there can be no conviction.

5. The verdict was clearly against the evidence and the law.

The information in this case alleged that the goods taken were the property of one J. M. Armstrong and one Thomas Stohl. True, the indictment omitted the name of Stohl. After the testimony was in and the Commonwealth's witnesses testified that the property was the property of J. M. Armstrong and Thomas Stohl, the district-attorney offered to amend, which amendment was permitted, and, as we believe, rightly, for, under section 13 of the Act of 1860, our Criminal Procedure Act, we find this: "If, on trial of any indictment for felony or misdemeanor, there shall appear to be any variance between the statement of such indictment and the evidence offered in proof thereof, in the name or any place mentioned or described in any such indictment, or in the name or description of any person or persons or body politic or corporation therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offense charged therein, or the name or description of any person or persons, body politic or corporate therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offense, or in the Christian name or surname, or both Christian or surname or other description whatsoever of any person or persons whomsoever therein named or de-

scribed, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court, before whom the trial shall be had, if it shall consider it of sufficient importance to the case, and the defendant cannot be prejudiced thereby in his defense, to order such indictment to be amended, according to the proof, by some officer of the court, both in that part of the indictment wherein such variance occurs and in every part of the indictment in which it may become necessary to amend, and after such amendment the trial shall proceed in the same manner in all respects and with the same consequences as if no variance had occurred. And in every verdict and judgment which shall be given after making such amendment shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made."

This section has been sustained by our Supreme Court; and the one prominent case on that subject is that of *Rosenberger v. Com'th*, 118 Pa. 77, wherein it was held that it was not error to amend by laying special portions of the goods of A. and other portions of the goods of B. In this case, where it appeared that the goods taken were a lot of cigars, a part of them belonged to one person and part to another, held that it was not error, after the trial had proceeded and the evidence having been heard, to permit the district-attorney to amend the indictment by laying the ownership in the same manner as the evidence showed. As to this, Justice PAXSON very curtly says in his opinion: "The court allowed an amendment in regard to the ownership of the property stolen. This was harmless, and, moreover, is expressly authorized by Act of Assembly."

So, from this position of law, the amendment was properly allowed and placed the indictment in such a position that a verdict could stand. With the amendment allowed, then the indictment stood that the property stolen was the property of Armstrong and Stohl, the same as the information alleged, and the same as if the name of Stohl had been originally in the indictment.

The testimony as to the ownership of the goods taken was somewhat contradictory. That was a question for the jury, and, under the charge of the court, the jury evidently found that the ownership was in Armstrong and Stohl; otherwise, their verdict would have been not guilty. Because we said to the jury, if they found that the title to this property was in any

other person, or any other persons were associated with them as part owners, then their verdict should be not guilty; or if they found that any other person had an interest with Armstrong and Stohl in this property, that person had a right to sell the property; and if they so found, their verdict should be not guilty; hence they must have found from the testimony that the property taken was the property of Armstrong and Stohl, as the amended indictment alleged.

This position answers all the reasons for the arrest of judgment, except that of the alleged remarks made by the counsel for the Commonwealth, which are alleged to have been improper. But before taking up that phase of the case, I desire to express my view of the law as learned by an examination of this case. The learned counsel cited a case by Judge IKELER, reported in 15 C. C. R., where he reviewed at length a case somewhat similar to this one as to the point refused by the court. In that case, as in this, the court intimated that if it were wrong, it would gladly hear it in arrest of judgment. Judge IKELER, in the case referred to, refers to a case reported in 8 Phila. 115, wherein it is held, without giving the facts of the case, that motion for arrest of judgment cannot be had or taken advantage of in this stage of the proceedings. The judge, in the case of 8 Phila. 115—the case of the *Com'th v. Morby*—does not recite the facts, but he says that, “in a case where the defendant was convicted for receiving stolen goods, and, in support of a motion in arrest of judgment, it was alleged the goods were not properly and sufficiently described in the indictment, which set forth that they were ‘stereotype metal,’ whereas the evidence at the trial proved them to be ‘stereotype plates,’ but that a variance of that kind could not be taken advantage of upon a motion in arrest of judgment, but if available at all should be made the ground for demurrer to the indictment or motion to quash.” He refused the motion for a new trial. True, this is a Quarter Sessions opinion; but this same view, we find, is held by our Supreme Court, in the case of *Kilrow v. Com'th*, 89 Pa. 480, wherein Judge WOODWARD, after a careful review of all the matters in the case, speaking of the amendment made during the progress of the trial by striking out one of two crimes alleged in one count of the indictment, says: “The defect, however, is beyond any present reach. The rule seems to be that while duplicity in criminal cases may be objected to by special demurrer or, perhaps, general demurrer, or be ground for an application to quash the indictment, yet the better view is

that it cannot be made the subject of a motion in arrest of judgment or of writ of error. It is cured by a verdict of guilty as to one of the offenses, and not guilty as to the other, and by a *nolle prosequi* as to one number of the counts. After a verdict of guilty at the trial of the defendant on the amended indictment, it would be hazardous to depart from what is supposed to be the prevailing general rule.” From this view, we find that a motion in arrest of judgment cannot lie. Had this case rested upon the question alone of the right to make the motion in arrest of judgment, under the circumstances, it being made at our suggestion, we would not pronounce sentence, but the other elements and questions in the case virtually take that question away from us. We are glad to know that while we were wrong in making that suggestion, we have now learned that it is not the proper remedy.

This leads us to the remainder of the reasons for the arrest of judgment, to wit, the remarks made by the district-attorney in his argument to the jury. While the remarks of the attorney may have been improper, and while he may have alleged and said some things to the jury, which attorneys frequently do, that are not strictly in accordance with the evidence, yet the attorney for the defense took no exception to the remarks made at the time of the making of the remarks. Unless an exception has been taken, and the remarks taken down by the official stenographer, they cannot be reviewed by the court at this time. This has been well settled in the case of *Com'th v. Webber*, reported in 167 Pa. 154. In this case the defendant was on trial for murder. In arguing the case to the jury, the private counsel for the Commonwealth argued to the jury and made statements which were unwarranted and entirely without any foundation, so far as the evidence was concerned. The remarks were taken down by a private stenographer employed by the defense. At the time of the remarks, or during the trial, no exception was taken to the remarks, and they were not taken down by the official stenographer, and no exception allowed by the court; hence they did not become part of the record. And the Supreme Court say that they cannot be reviewed, under any circumstances, except when an exception is taken to the remarks of counsel at the time, and the remarks taken down by the official stenographer and made a part of the record. For this reason, we cannot consider the remaining reasons for the motion in arrest of judgment.

And now, August 17, 1896, the motion for arrest of judgment in this case is refused.

Orphans' Court.

In re Estate of WILLIAM HINDS, Deceased.

Those who lend money to trustees upon the security of trust assets on representation that the proceeds were to be used for a specific purpose which inquiry would have shown was without authority, thereby become parties to the breach of trust and trustees *ex malaficio*, liable to account for such assets.

Petition to compel transfer of stocks.

HAWKINS, P. J.

STATEMENT.

In 1884, Thomas H. Chapman applied as guardian of the minor children of said decedent to the Bank of Pittsburgh for a loan, representing that the proceeds were intended to be used in the improvement which this court had authorized, of his wards' real estate; and that bank upon the strength of the representations thus made by the guardian, without examination of the record of this court, made the loan, taking in pledge, stock of this bank owned by the wards. Had examination of the records of this court been made, it would have appeared that the guardian had asked authority to make improvements on certain real estate of his wards to the extent of five thousand dollars "with the receipts and revenues arising from the estate of said minors during the current year, together with the funds already in the hands of your petitioner will afford a sufficient sum of money to make said improvements;" and that an order had been made on the petition authorizing such improvements.

An additional loan was afterwards (1888) made in like manner; and the record showed that the guardian had asked authority to make improvement on certain other real estate of his wards to the extent of five thousand dollars; that he had "belonging to said wards ample funds available to pay for the erection of said building;" and that an order had been made on this (second) petition, authorizing such improvements to be made.

Renewal notes were given in these instances from time to time fluctuating in amounts—sometimes increased and sometimes diminished—as shown by the attached schedule, until the loans seem to have been reduced to two thousand dollars. An application was then made for a loan of twenty thousand dollars for an alleged purpose similar to that of the former loan. It was not asked upon the strength of an order alleged to have been made authorizing an improvement; but upon an allegation that because similar orders had been made theretofore, this

court would make another order; and upon the strength of this statement the loan was made—stock of the Merchants and Manufacturers Bank, also belonging to said wards, being substituted for that of the Bank of Pittsburgh as security. The promised order of this court was never made, nor even application made therefor.

Two thousand dollars of the proceeds of this loan went in satisfaction of the balance of the former loan which the guardian now alleges had gone in fact into the improvement authorized; and eighteen thousand dollars was invested by the guardian in a private corporation of which he was the president.

When the guardian filed his final account he claimed credit for this loan; and exception was taken to this and other items. This court suspended action on this item until liability for the loan and pledge as between the estate and bank should be ascertained; and surcharged the guardian on the other items with an amount exceeding one hundred thousand dollars, and judgment was entered thereon as against the guardian and his sureties. A petition was shortly afterwards presented to court on behalf of the succeeding guardian, setting forth that these sureties had made an offer of compromise of these judgements; and, this offer being in the petitioner's opinion, after investigation, advantageous, asked that authority be given to accept it; whereupon this court granted an order with the following qualification:

"The compromise herein authorized be a complete and effectual release and discharge of each of said sureties making such payment from all liability upon judgments at Nos. 762, 763 and 764 April Term, 1896, and also to be a full release from all further liability upon a bond on which said judgments are based; except that in event of a recovery being had by William Hinds against the Bank of Pittsburgh of certain stocks in proceedings instituted and now pending in this court at No. 132 June Term, 1896, or of a recovery in any similar suit hereafter instituted by or on behalf of the other beneficiaries of said bond, the liability of said sureties as to the subject matter of said proceeding or proceedings shall be in no way compromised, affected or discharged. And the carrying into effect of said compromise or compromises to be in no way construed as creating or admitting any liability on the part of said sureties to the Bank of Pittsburgh or others by reason of the exceptions herein contained."

The present proceeding was instituted with a view to compel the retransfer of these stocks to the credit of the petitioners; and the question submitted to this court is whether said loan and

pledge was a valid exercise of the authority of the guardian. Both the Bank of Pittsburgh and the Merchants and Manufacturers Bank were made parties respondent.

OPINION. Filed November 9, 1896.

It is conceded that if the loans and pledges in this case were made with notice of the breach of trust the prayer of petitioner must be granted; but it insisted that there was neither breach of trust nor notice. These are the issues; and in respect of both the decision must be in favor of petitioner.

(1.) The guardian had no power by virtue of his office, nor of any order of court, nor was there any occasion, to borrow. It may be conceded that he had power to sell his ward's personal estate for purposes incidental to his trust, as with a view to make other more advantageous or safer investments; but what reason could he have to borrow? Certainly for no ordinary purpose. The reasons which gave rise to the rule that a power to sell implies a power to mortgage, do not exist here. These powers are simply alternative modes of raising funds for the payment of debts in the administration of estates by executors, or administrators. A guardian has ordinarily nothing directly to do with the payment of debts of an estate; that is a peculiar function of the administrator; while his function is to receive, hold, and invest the "surplusage;" *Chambersburg Saving Fund Association's Appeal*, 76 Pa. 208. He has no power to create new debts: *McCreery's Appeal*, 81 PITTSBURGH LEGAL JOURNAL, 230; consume any part of the principal; nor change the course of descent by converting personal into real, or real into personal, estate without the sanction of the Orphans' Court; but must maintain in its integrity and character the whole corpus. In the exercise of powers of sale, abuses are unavoidable. Thus in this very estate the guardian sold a large number of valuable bank stocks with a view to relieve himself of encumbered real estate which his wards were afterwards compelled to accept because of his insolvency. Such instances as this are fortunately of rare occurrence. Necessity compels their endurance; but, opportunities and temptations to abuse will be greatly increased without any occasion by concession to guardians of the power to borrow. Injudicious, improvident or, fraudulent, transactions will happen; and the ward's property, pledged at an undervalue, be forfeited for want of redemption, when sale at the market value in the first instance would have averted the loss; and difficulties in fixing the liability of guardians in

such cases are increased to the ward's great disadvantage. These are hazards which there is no reason to assume, and can only be prevented by the denial of any right to borrow unless with the prior sanction of the Orphans' Court. The occasions are so rare in the course of guardianship in which borrowing becomes necessary, or advisable, either on security of real or personal estate, that such a rule can cause no inconvenience. The guardian cannot engage in active business; his duty is to "hold" and "invest." There is no reason why his power in respect of borrowing on security of personalty should differ from his restricted power over realty. There was not only no authority given by this court to borrow, but an implied prohibition. The decree was an adjudication.

(a) That petitioner's averment of sufficient available assets belonging to the estate with which to make the improvements was true, and,

(b) An appropriation of those assets to that purpose, which neither the guardian, nor those who claim under him can now deny. As no modification of this decree was ever asked or made, it must be conclusively presumed that these funds were used as decreed. Power to convert a ward's personal into real estate by making valuable improvements ought not to be assumed without sanction, because it affords the guardian an opportunity to act independently of court whose officer he is; alter the course of descent; or improve the ward out of his estate, contrary to the policy of the law. Where improvements have been made judiciously the court may of course in its discretion ratify them: *Miller's Estate*, 1 Pa. 328; *Ebert v. Ebert*, 55 Id. 110; *Killpatrick's Appeal*, 118 Id. 46. But the evidence here fails to show that more than the amount appropriated by this court was needed in making the improvements. Eighteen thousand, of the twenty thousand, dollars last borrowed was traced distinctly into another investment, and credit therefor stricken from the guardian's final account as illegal. What became of the other money borrowed has not been satisfactorily shown. But the inconsistency of this transaction with the guardian's sworn statement, and his concealment of it from this court for so long a period, taken in connection with his waste of over one hundred thousand dollars of trust funds that had been placed in his care, are pregnant with suggestion of suspicion. Done without, and in defiance, of authority, without occasion, and without apparent benefit to the estate, it was a palpable breach of trust.

(2.) Those who deal with trustees are pre-

sumed to do so with notice of the legal limitations of their power; and when they go outside of this, do so at their own risk. Absolute owners may do as they please with their property so long as they do not infringe the laws of public policy; but trustees, whether bankers, attorneys, guardians or others, act in a representative character, and are limited by the purpose of the trust which each holds. Administrators, executors and guardians are *quasi* public trustees with duties prescribed by law which every one is obliged to know, and notice of whose character is notice of the limitation of their power. *Mala fides* is always imputed to him who fails to inquire into the true nature of a transaction which does not fall in with the ordinary current of authority. The application of this principle is aptly illustrated by the case of *Marshall's Estate*, 138 Pa. 285. An executor, without authority, offered in pledge stocks belonging to his trust to a bank with a view to secure a loan, the proceeds of which he declared were intended to be used in the continuance of the business in which his testator had been engaged. Trusting to these representations without further inquiry, the bank made the loan; and proceedings having been thereafter taken to compel restoration of the stocks, it was held that there was enough to put the bank on inquiry, which would have led to a knowledge of the facts; and that it was therefore a party to the breach of trust. "The absence of any reference in the will," said the court, "to the firm of James Marshall & Co., ought of itself to have excited inquiry. But there is no evidence that they even examined the will, or made any inquiry of the co-executors or co-legatees of James Marshall, Jr., or consulted an attorney in reference to the matter. They appeared to have trusted alone to the representations of James Marshall, Jr., and have themselves to blame for their credulity. It would be simply a perversion of justice to hold that in such circumstances this petitioner, without any default on her part, should lose her beneficial interest in the stocks." An order of restoration was accordingly made. The facts here are substantially those. Respondent dealt with Mr. Chapman, in his representative character as guardian, and with stocks known to belong to his ward. It having been informed that the purpose was to improve the ward's real estate, respondent was bound to know that the guardian had no power to improve without the sanction of this court; and when told that the court had authorized the improvements, was bound in the exercise of ordinary prudence, to inquire into the extent of this authority. "Every man is bound," said

the court in *Messenger v. Kintner*, 4 Bin. 10, "to take notice of the record which is the foundation of his title. If they look into the title at all the decree of the Orphans' Court stares them in the face at the first step, and seeing the decree, they must take notice at their peril of the proceedings on which it is founded." So, on the same principle here, if respondent had examined the record, which as already seen he was bound to do, it would have found that not only was there no authorization, nor occasion for, a loan, but an implied prohibition. In making the last of the series of loans they did not even wait, but took the risk of an anticipated order, for improvement. The specific purpose in making all these loans was to provide means for carrying out alleged orders of court made, or anticipated, for the improvement of the ward's real estate. The attention of the respondent having been thus specifically directed, made the duty of inquiry the more imperative. He who discounts a note without inquiring into a partner's right to use his firm's name in making an accommodation indorsement, does so at his own risk: *Tanner v. Hall*, 1 Pa. 417; so it is the part of common prudence to inquire into the responsibility of an unknown indorser; and so here the reasons are at least as urgent to inquire into the responsibility of this estate: *Bank v. Stiver*, 169 Pa. 574.

The respondent having thus had notice that the guardian was acting without authority, and without occasion for a loan, was a party to his breach of trust, and became answerable to petitioner for the loss which resulted.

For bank, *Geo. P. Hamilton*.

For petitioner, *Edward B. Soull*.

BOOK NOTICE.

FEDERAL JURISDICTION AND PROCEDURE, as modified by Acts of Congress of March 3, 1891, and March 3, 1887, corrected by the Act of August 13, 1888, by WILLIAM A. MAURY, LL. D. Published by W. H. LOWDERMILK & Co., Washington, D. C. 1896.

This is a book of some sixty pages, published in pamphlet form. It treats of the recent Acts of Congress in relation to the United States courts and the decisions and practice thereunder. It particularly relates to the act establishing the Circuit Court of Appeals. The rules of court and decisions are very fully cited to date. An instructive book for the student and very useful for all lawyers in their practice in the United States courts. Dr. Maury, author, was formerly Assistant Attorney General and is now a professor in the Law School of Columbian University.

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PITTSBURGH, PA., DECEMBER 2, 1896.

Supreme Court, Penn'a.

In re Petition of CORA E. FISHER.

That part of the Act of April 1, 1870, which empowers the city of Allegheny to appoint viewers to assess the benefits and damages for a change of grade of a street is unconstitutional.

The city of Allegheny changed the grade of a street under the Act of April 1, 1870. Viewers are appointed on petition of a property owner, under the Act of May 6, 1891, who assess the petitioner's damage. This latter act also authorized the city to change the grade of streets. Held, that the fact that the work was done under the Act of 1871, the provisions of which for assessing damages are unconstitutional, does not prevent a property owner from having his damages assessed under the Act of 1891.

Appeal of the City of Allegheny, from the decree of the Court of Common Pleas No. 3, of Allegheny county, in the matter of the petition of Cora E. Fisher, for the appointment of viewers to ascertain the damages and assess the benefits resulting from the change of grade of Woodland avenue, in the Eleventh ward of the city of Allegheny.

Cora E. Fisher presented her petition, alleging that she was the owner of certain property on Woodland avenue, in the city of Allegheny, that by virtue of an ordinance dated March 9, 1894, the said city graded Woodland avenue, including the portion thereof in front of her premises, that she had failed to agree with the city as to the amount of compensation due her, and prayed the appointment of viewers to ascertain the same in accordance with the Act of May 16, 1891, and its supplements. The court appointed viewers on May 25, 1895. On July 13, 1895, the city presented a petition to vacate the appointment of viewers. The petition was dismissed. The viewers reported awarding to Cora E. Fisher \$1,500, and to other property owners other sums, and assessing all the benefits from the grading of Woodland avenue upon the city of Allegheny. The city filed exceptions, *inter alia*, as follows:

1. That the question of benefits and damages to property abutting on the line of the above improvement has been determined by a former proceeding in accordance with the Act of April 1, 1870, relative to the streets in the city of Al-

legheny, and its supplements, in pursuance of the provisions of which act the councils of the city of Allegheny by ordinance approved September 21, 1893, changed the grade of Woodland avenue from California avenue to Superior avenue, and appointed viewers to assess benefits and damages caused thereby.

The viewers performed their duties in strict accordance with said acts, and on January 18, 1894, their report was finally confirmed by councils. The actual grading was afterwards done in pursuance of an ordinance duly passed and approved.

2. The general street Act of May 16, 1891, P. L. 75, is not a curative act.

The court dismissed the exceptions. The city then took this appeal and assigned as error: 1. That the court entertained jurisdiction of the petition for the appointment of viewers; 2, that it did not vacate the appointment of viewers.

For appellant, *George Elphinstone and Elliott Rodgers.*

Contra, Charles W. Dahlinger.

Opinion by WILLIAMS, J. Filed November 9, 1896.

The Constitution guards the citizen against an unjust or oppressive exercise of the right of eminent domain. In section 8, Art. XVI., it is provided that municipal, like all other corporations, possessing the right of eminent domain, shall make "just compensation for all property taken, injured or destroyed by them;" and that such compensation shall be paid or secured to the owner before the taking, injury or destruction shall be allowed to take place. The same section secures to the property owner the right to appeal from any preliminary appraisal of the compensation due him, and the further right to a trial before a jury in such appeal according to the course of the common law.

The machinery by which this "just compensation" shall be ascertained is provided by the Act of 1874. It is set in motion upon the petition of the corporation or of the owner. It consists of the appointment by the proper court of viewers to investigate and determine the value of the injury done to the owner, and their report to the court. From this report an appeal lies to the court that appointed the viewers, in which upon request the amount of the damages to be paid to the claimant may be determined by trial before a jury.

The whole proceeding is judicial. Every successive step is made a matter of record in the office of the clerk of the court, and is open to the inspection of the parties and the general public at all times. The idea that the corporation exer-

cising the right of eminent domain might exercise judicial jurisdiction over its own causes, appoint viewers to ascertain the damages it had inflicted upon a property owner, require him to come before it and contest the conclusions of the viewers, confirm or set aside the report at its will, and set up its own action in support of the plea of *res adjudicata*, when called upon in a court of law to answer for the taking, injury or destruction of the property of the citizen, gets no support or countenance from the Constitution or the general law of 1874. It is too monstrous to be tolerated. The city is the taker. The citizen whose property is affected is the complaining party, the plaintiff. This controversy must be litigated in, and determined by, the established judicial tribunals to which the decision of all other controversies is committed.

The defendant can have no better right to sit as judge in its own case than the plaintiff, and so much of the local Act of 1870 as professed to confer this power upon the defendant is a palpable violation of the declaration of rights, and of section 7, Art. III., of the Constitution.

The city can properly raise committees, or appoint viewers, or boards of appraisers, for its own information and require reports to be made to the mayor, councils, or heads of departments. Such bodies are instrumentalities made use of in the administration of municipal affairs to facilitate the transaction of business, and to secure exact information in regard to important subjects upon which municipal action may become necessary. But it can call upon no one having a claim against the city to submit to the arbitrament of such boards or committees, or of the city itself.

Now in this case the city of Allegheny, by ordinance established the grade of Woodland avenue, and in the same ordinance, acting under the local Act of 1870, appointed viewers to assess the damages and benefits occasioned thereby with directions to report to the city councils. The viewers made a report allowing no damages and assessing no benefits. This report was confirmed by the city councils.

In 1894 the work of changing the grade upon the ground was entered upon, and the avenue was put upon the grade established by the ordinance. In 1895, Cora E. Fisher presented her petition to the Court of Common Pleas of Allegheny county for the appointment of viewers to assess the damages she had sustained by reason of the change of grade. Viewers were appointed who awarded damages, and imposed them upon the city. This report has now been confirmed, and the present appeal was taken from the decree of confirmation.

The appellant alleges that the Court of Common Pleas has no jurisdiction over the assessment of damages done, or benefits conferred, by the change in the grade of Woodland avenue. The first reason given in support of this denial of jurisdiction rests on the alleged legal value of the proceedings taken by the city before itself, under the Act of 1870. The second rests upon a denial of the jurisdiction of the court. The first of these reasons requires no discussion. It was decided by this court in *In re Wyoming Street*, 137 Pa. 494, and in *Huckstein's Appeal*, 165 Id. 367. The second reason has not been heretofore considered, but it does not seem to be involved in much difficulty. The entry of the city upon the premises of Mrs. Fisher was made, as is alleged, under the Act of 1870, but it was equally authorized by the Act of May 16, 1891, and its supplement of June 12, 1893. The Act of May 16, 1891, authorizes all municipal corporations to change the grade or lines of its streets, lanes or alleys, and in so doing to take, use, occupy or injure private property.

If the compensation due to the owner is not ascertained by agreement, provision is made by this act for its ascertainment by proceedings in the Court of Common Pleas of the proper county. Upon petition of the owner or of the corporation, viewers are to be appointed to ascertain the damages and the benefits and make report to the court appointing them. When the report is made, both parties have an opportunity to be heard for or against the report, and, if required by either party, a trial may be had before a jury, and the amount to which the owner is entitled as his "just compensation" determined by a verdict. This act is general in its terms. It embraces "all municipal corporations of this Commonwealth;" and it provides a remedy for every person injured by the action of any municipal corporation relating to the change of the grade of any of its streets, lanes and alleys.

If by reason of the unconstitutionality of the provisions of the Act of 1870, relating to the assessments of damages and benefits for the change of grade upon Woodland avenue, there is no local act under the terms of which the plaintiff has a right to apply to the Court of Common Pleas, then the Act of 1891 provides a remedy. It refers to this subject. It empowers the court to act upon the petition of either party, and provides the necessary machinery for the ascertainment of damages and the assessment of benefits. If the entry authorized by this act has taken place under the authority of any Act of Assembly, and there is no other means of determining the amount of injury done thereby to the property owner, he may come into the

Court of Common Pleas and ask to be accorded the benefits of an ascertainment of his damages under the provisions of the general law of 1891. A party entitled to relief will not be turned away from the courts because his property has been taken, injured or destroyed under a local law that makes no provision for compensation, so long as a general law can be found which supplies the deficiency in the local law and gives him an ample remedy. The city has changed the grade of Woodland avenue. It had a right to do so under the Act of 1870, and that of 1891. The Act of 1870 made no provision for ascertaining the damages done by the change of grade. The Act of 1891 makes ample provision and the plaintiff is entitled to the benefit of its provisions.

The judgment is affirmed.

KUHN v. OGILVIE.

It is well settled that a married woman may mortgage her estate as security for her husband's debt, including future advances to him, or for the debt of any other person.

This right has not been in any way changed by the Act of June 8, 1893, which was intended to enlarge the powers of a married woman, and not to deprive her of, or limit those of which she was already possessed.

Appeal of Ada J. Ogilvie, defendant, from the judgment of the Court of Common Pleas of Cambria county, in an action *sci. fa. sur* mortgage, brought by Henry H. Kuhn, trustee for the creditors of Christ Mintmier and Thomas Ogilvie, trading as Mintmier & Ogilvie, and of Thomas Ogilvie, as surviving partner of the firm of Ogilvie & Watkins, against the said Ada J. Ogilvie, to recover the sum of \$4258.44, as security for which sum the said mortgage was executed.

By agreement of counsel, trial by jury was dispensed with, and the cause was submitted to the decision of the court, under the provisions of the Act of April 22, 1874.

The court found the facts to be as follows:

On March 1, 1894, Thomas Ogilvie and Ada J. Ogilvie, executed in proper form a mortgage to Henry H. Kuhn, "trustee for the creditors of 'Mintmier & Ogilvie' and 'Ogilvie & Watkins.'" The mortgage recited the failure of said firms in business and that their creditors had agreed to accept fifty per cent. of their respective claims in full, and that they (Mintmier and Ogilvie) had agreed to give promissory notes for the same, payable in three, six, and nine months, the payment of which notes to be secured by a trust mortgage to be given by Ada J. Ogilvie on real estate owned by her. The said mortgage further recites as follows: "And whereas the

said Ada J. Ogilvie and Thomas Ogilvie, her husband, stand ready to mortgage the property of the said Ada J. Ogilvie, hereinafter described, in pursuance of the foregoing agreement and subsequent verbal agreements between the said parties above mentioned, to secure the payment of certain promissory notes given by said Thomas Ogilvie to his creditors in the full sum of forty-two hundred and fifty-eight dollars and forty-four cents (the amount due each creditor set forth in the statement hereto annexed), according to the terms and tenure of said promissory notes." The defeasance clause in the mortgage reads as follows:

"Provided, always, nevertheless, that if the said Thomas Ogilvie or Mintmier and Ogilvie, their heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the said several creditors aforesaid their respective claims and demands in the full and aggregate sum of forty-two hundred and fifty-eight dollars and forty-four cents, being the total amount of a promissory note for the security of which this mortgage is executed upon the days and times mentioned in said notes for the payment thereof and all costs, etc., then and from thenceforth this present indenture and the estate hereby granted shall cease and determine and become absolutely null and void, etc." The real estate covered by the mortgage was the property of Ada J. Ogilvie. The notes given for the indebtedness of Mintmier & Ogilvie were signed by Thomas Ogilvie with the firm name; the notes given for the indebtedness of "Ogilvie & Watkins" were signed by Thomas Ogilvie with his individual name. The firm of Mintmier & Ogilvie consisted of Christ Mintmier and Thomas Ogilvie, and the firm of Ogilvie & Watkins of Thomas Ogilvie and Lee W. Watkins. Thomas Ogilvie furnished all the capital that was put into the business of both firms.

Upon these facts the court entered judgment in favor of the plaintiff. Whereupon the defendant took this appeal, assigning for error this action of the court.

For appellant, *R. E. Cresswell.*

Contra, Donald E. Dufton, Henry H. Kuhn, M. D. Kittell and Alvin Evans.

Opinion by MITCHELL, J. Filed November 9, 1896.

A mortgage being in many respects treated as a mere security, though in form a conveyance, it might well have been held that a mortgage by a married woman to secure her husband's debt, is in substance a contract of suretyship which she was not, at common law, capable of making. But on the other hand, she has under

the law of Pennsylvania, the right of every property holder to convey her estate, subject to certain conditions as to mode, etc., and as she could sell or mortgage and give the money immediately to her husband, there was no substantial reason why she should not subject her estate to a merely contingent liability for the same purpose. When the case of *Hoover v. The Samaritan Society*, 4 Whart. 445, came before this court, the latter argument prevailed, and it was held that a married woman could use a power of appointment to execute a mortgage as collateral to her husband's bond for money loaned to him.

This view has been steadfastly adhered to, and it is now the established rule that a married woman may mortgage her estate as security for her husband's debt, including future advances to him, or for the debt of any other person: *Haffey v. Carey*, 78 Pa. 431; *Hagenbuch v. Phillips*, 112 Id. 284; *DuBots Bank v. Kuntz*, 175 Id. 482.

This being settled, the only question left open in the present case is whether the rule has been changed by the Act of June 6, 1893, P. L. 344. It will be observed that the cases last cited were decided after the married woman's Act of 1848, and it was held that the capacity of a married woman to mortgage her estate was not affected by that act, the purpose of which was to restrict the husband's power and that of his creditors, but not that of the wife herself. The Act of 1893 is a further step in the same direction, and instead of contenting itself with restricting the power of the husband, it affirmatively enlarges the power of the wife. The first section provides for her control over the estate, including conveyance and mortgage of realty when her husband joins. The second authorizes her to "make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation indorser, maker, guarantor or surety for another." It is upon this last clause that the argument for the appellant rests. It is clear, however, that this was a cautionary provision against too liberal a construction of the very large powers conferred by the first part of the section, a saving of the previously existing disability so far as it covered the particular class of contracts specified. The general intent of the act is so plainly in enlargement of her contractual capacity, that nothing less than explicit negative words should be construed as narrowing powers admittedly possessed before the passage of the act.

The case of *Patrick v. Smith*, 165 Pa. 526, arose

under the Act of 1887, and there is nothing in it in conflict with this view of the Act of 1893. A wife indorsed her husband's note, which plaintiffs discounted and passed to her credit, and she immediately drew a check to her husband's order for the whole amount. At maturity the husband paid part of the note and the wife gave her note for the balance, which plaintiffs discounted and she again drew her check to her husband's order for the proceeds. On this note she was sued. It was held that her action throughout was for the accommodation of her husband, and that the statute could not be evaded by such a "transparent device" to which the plaintiffs were party.

Real Estate Co. v. Roop, 132 Pa. 496, also arose under the Act of 1887, and the strict construction given there probably had much influence in the passage of the Act of 1893, with enlarged grant of contractual capacity in express terms.

Judgment affirmed.

PLONK v. JESSOP.

In an action to recover damages by reason of imperfect work of a journeyman mechanic it is the province of the jury, only, to find whether the action of the plaintiff in an emergency arising from the improper work is contributory negligence or not.

Whether it is negligence to go with a light in search of a leak of gas is ordinarily a question for the jury under all the circumstances of the case.

Appeal of John W. Plonk, plaintiff, from the judgment of the Court of Common Pleas of York county, refusing to take off a compulsory nonsuit entered in an action of trespass, wherein Samuel N. Jessop was defendant.

On the trial of this cause, the plaintiff showed the following case: The plaintiff employed the defendant, a plumber by trade, to put gas fixtures in his house; he had instructed the defendant where it was desired to place the gas fixtures, and informed him that none were wanted on the third floor of the premises. The defendant sent his employees to the plaintiff's house to do the work required and the borough gas company introduced the gas from the main in the street to the plaintiff's cellar. After the departure of the plumbers, escaping gas was detected in the house. It being dark, the plaintiff attempted to search for the leak with a lighted taper. Upon ascending to the third floor, an explosion took place by reason of the contact of the escaping gas with the taper plaintiff carried, by reason of which he was injured. It was discovered subsequently that the defendant's employees had omitted to put a cap upon the open end of a pipe on the third floor.

The defendant endeavored to prove on cross-

examination that the year before the defendant was employed to attach the fixtures in certain parts of the house indicated by plaintiff another plumber had located the gas pipes in the house. He proposed to ask plaintiff in cross-examination whether the York Gas Company had tested the system of pipes in the house. The question was objected to by the plaintiff. Objection overruled. (First and second assignments of error.)

The court entered a compulsory nonsuit and the court *in banc* refused to take it off. (Third and fourth assignments of error.)

For appellant, *H. L. Fisher and G. G. Fisher.*
Contra, *R. E. Cochran, S. Williams, H. C. Niles and G. E. Neff.*

Opinion by MITCHELL, J. Filed October 5, 1896.

The plaintiff testified that when indications of a leak in the pipe were discovered, he told defendant's workmen that they ought to fix it, they "started to go upstairs to find the leak," and when they came out "they said everything was all right." Later in the day, plaintiff smelling gas in the hall, "lit a match the same as the plumbers did, and laid it along the pipes," then "got a taper and lit that and started along up the pipes, clear up to the attic," where the explosion took place by which he was injured. The place and cause of the leak were apparently attributable to the failure of a previous gas fitter to put a cap on the end of the pipe in the attic, but the defendant's men having seen from the rapid movement of the indicator in the meter that there was an important leak somewhere, and having left the work without having located it, yet assuring plaintiff that everything was right, there was sufficient evidence to submit to the jury of defendant's negligence.

But the plaintiff having admitted that he knew or had heard that gas would explode if brought in contact with a light, the learned judge below entered a nonsuit on the ground of contributory negligence. In so doing he failed to give sufficient weight to the circumstances, and to the plaintiff's explanation that he did as the plumbers did "because I saw them hunt in the same way with matches and a taper." The knowledge of the explosive character of gas certainly may be presumed to be general among persons who have it in their houses, and plaintiff admitted such knowledge. But how far a smell of gas indicates a leak that may safely be searched for with a match or candle, and at what point it means danger of explosion in so doing, is a question requiring judgment and some experience. Plaintiff had

seen indications of a leak, had seen it searched for by defendant's men with matches and a light, and had then been told that everything was right. When after that he smelled gas it could not be said as a conclusion of law that he necessarily had reason to suppose he would find anything more than a leak that might be safely searched for with a light as he had seen done by defendant's men earlier in the day. He may have been negligent in going into the attic as he did, but we think it is for the jury and not for the court to say so.

Judgment reversed and procedendo awarded.

BANKRUPTCY LAW.

To the Editor of the Pittsburgh Legal Journal:

I have taken the liberty of writing this communication to you, thinking it might interest some of your readers to know what is the present status of the bankruptcy laws pending before Congress.

I think that lawyers are particularly interested in these laws and should use all their influence in having one passed which should be of use to the country. Congress will meet on the 7th of this month, and part of the unfinished business carried over from the last session is the Henderson Bankruptcy Bill which passed the House on May 2d by the decisive vote of 157 to 81. This is a great victory for him and is the result of a long protracted contest by those who think this country needs some National Act that will make the manner of collecting debts the same all over the Union.

When a Boston wholesale dealer sells his goods to a retailer in Texas, he ought to know how he is to collect his account; he ought not to be forced to study the collection laws of the State into which his goods penetrate.

The Act of 1867 passed out of existence with midnight August 31, 1878. Since then those who favored the Bankruptcy Law have waged a ceaseless, never-resting contest until at last it seems as if victory has crowned their efforts.

The first bill of importance was the "Lowell Bill," designed by Judge LOWELL, of the United States Circuit Court. This bill resembled very much the old Act of 1867, and had many admirers and many bitter enemies. It was principally championed by Senator Hoar, and passed the Senate several times only to meet ultimate defeat in the House by attacks led chiefly by Congressman Kilgore. One of the alleged defects found in this bill by its detractors was that it gave too many offices to the lawyers and they thought every one should

have a chance to be Register to carry out the law, and so an amendment was actually tacked on to the bill doing away with the clause requiring the Register to be learned in the law and throwing the office open to farmers, merchants, etc.; fortunately they did not take away from the United States Courts the power of appointing the Register, and so I do not think many farmers, who had never even opened a law book, would have been appointed to decide cases which ultimately would have to be passed on by the higher courts.

At one time after this Lowell Bill had passed the Senate it came within five votes of passing the lower House, but those five votes were unattainable, and the bill fell by the wayside.

The next important bill was the "Torrey Bill," named after its author, a well-known attorney in St. Louis. This also came near to passage, but was destroyed by its enemies.

The next was the "Bailey Bill," named after Representative Bailey, of Texas, and it did seem as if the West would unite on some bill and secure its passage.

There are two classes of most bitter enemies which the Bankruptcy Bills have had to face:—

First, those men who believe in a bill allowing debtors to take the benefit of a bankrupt law if they so wished, and, by giving up their property to their creditors, be discharged, so they could enter into business again, but bitterly oppose a bill with an "involuntary clause" by which a debtor could be forced into bankruptcy by his creditors.

These opponents were chiefly from the ranks of the western congressmen.

Second, those who did not believe in concentrating the law business in our great cities.

Under the Act of 1867 all petitions in bankruptcy were filed in the United States District Court Clerk's office, situated generally in the cities. Most of the proceedings were carried on there before the judge, thus the business of settling these cases was taken away from the smaller towns and thrown to the city attorneys. It can readily be seen that there were many congressmen who would oppose such a proceeding as it affected their own pocketbooks. Both of these classes were placated by the original Bailey Bill as it provided only for voluntary proceedings, and these were to be carried on under the State law in the county where the debtor resided (except the proceedings for discharge.)

When a debtor found himself insolvent or unable to pay his debts, he made a voluntary assignment in the manner prescribed by the laws of his State to some person selected by himself. This assignment was then filed in the

Recorder's office in his own county. In the bill originally introduced, it also required the debtor to file with his assignment a full list of his creditors which should be spread on the records at length. This, of course, would require a great deal of work on the part of the Recorder and would fill up many dockets in his office.

Mr. S. C. McCandless, of our bar, and one of the best posted men on bankruptcy in the State, pointed out this defect to Mr. Bailey, and the bill was amended so that now only an assignment is required, without a list of creditors or schedules of assets, to be recorded.

Within a fixed period, required by the act the debtor, after turning over his assets to the assignee, and after the assignee has distributed the estate, would then present to the United States Court a petition alleging that he had disposed of his entire estate and asking the court to grant him a discharge. The court then ordered the clerk to send notice to all the creditors of the debtor of the application, and a day was fixed for them to appear in open court and oppose the discharge, if they had any cause to do so. The discharge was then granted if no creditor opposed the application.

This feature threw a good deal of work on the clerk and the district judge, but was all that they had to do with the bankruptcy proceedings. The entire estate was settled by the county courts and there was no provision for a Register or any other official of the United States Courts who could have supervision of the management of the estate; but then there was no concentration of business into the cities, and every lawyer had a chance to wind up his own client's business at home.

This Bailey Bill came very near to passing in the last Congress; unless I am mistaken, it did pass the House, but was defeated in the Senate, where it was opposed by such staunch fighters as Senator Hoar, who insists on having an involuntary clause tacked to the bill and who has an amendment to that effect which he is trying to have adopted at the next session.

The Eastern members are almost unanimously in favor of an involuntary clause as they claim it prevents fraud and allows creditors to compel the debtor to wind up his estate and does not allow him to select his own assignee. This is a great advantage to the debtor which any one can perceive who has made a study of the failures of our county or even in our own city, where a debtor confesses judgment to all his relations and then makes an assignment to his lawyer and the outsiders generally whistle for their money.

Under the Henderson Bill a person who com-

mitted one of the following acts could be declared a bankrupt:

- (1) Concealed himself from his creditors and to avoid the service of process on him.
- (2) Failed for thirty days, while insolvent, to procure the release of property levied for a debt of \$500 or over.
- (3) Made a transfer of his property with intent to defraud his creditors.
- (4) Made an assignment for the benefit of his creditors.
- (5) Made a transfer of his property with intent to give a preference.
- (6) Procured a judgment to be entered against himself with intent to defraud his creditors.
- (7) Secreted his property to avoid its being levied upon.
- (8) While insolvent suffered an execution for \$500 or over, or a number of executions aggregating such amount against himself to be returned no property found.
- (9) Suspended and not resumed for 30 days while insolvent the payment of his commercial paper for \$500 or over.

I understand that this last act of bankruptcy has been removed during the debate in the House. A petition may be filed against a person who has committed an act of bankruptcy within four months after the commission of such act.

Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt. Any person owing debts to the amount of one thousand dollars or over, if adjudged an involuntary bankrupt upon an impartial trial, shall be subject to the provisions of this act except (1) a national bank; (2) a person engaged chiefly in farming or the tillage of the soil; or (3) a wage earner.

There is the same provision as under the old Act of 1867, where a partnership is declared bankrupt that the partnership creditors shall elect the trustee of the firm and individual estates, and there shall be separate accounts kept by the trustee, etc., and the same provision, if there be any surplus remaining of the property of any partner, after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts.

The bankrupt shall be allowed the exemption allowed by the State in which he has had his domicile for six months prior to the filing of the petition.

The bankrupt shall attend the first meeting of creditors and the hearing for his discharge, execute all papers as ordered by court, give notice at once to his trustee of any attempt to

prove a false claim against his estate, and file schedules of his assets, showing the amount and kind of his property, where located and its money value in detail, and a list of his creditors with their addresses all in triplicate, one copy of each for the clerk, one for the referee and one for the trustee, and submit to an examination by his creditors when required.

Where it is shown to the court that the bankrupt is about to leave the district and his departure will defeat the bankruptcy proceedings, the court will issue a warrant to the marshal and the bankrupt will then be brought into court and compelled to give bail for his appearance when wanted.

Compositions are provided for after the schedules have been filed and are to be accepted by a majority in number and amount of all creditors whose claims have been allowed, but (a new feature) the *consideration* to be paid by the bankrupt to his creditors and the money necessary to pay all debts which have priority and the costs have to be deposited in such place as shall be designated by and subject to the order of the judge.

There is no provision for a time extension to be accepted by the creditors.

The bankrupt can be discharged after the expiration of two months and within four months after having been adjudged bankrupt after a hearing before the judge, where he has not given a preference; obtained property on credit upon a materially false statement in writing made by him for the purpose of obtaining credit; made a fraudulent transfer of his property or with fraudulent intent and in contemplation of bankruptcy, destroyed or neglected to keep books of account or records from which his true condition might be ascertained. The discharge may be set aside within two years if it be proved that it was obtained by fraud.

The United States Courts have full jurisdiction over the bankrupts and all proceedings.

The courts may appoint referees each for a term of two years, and designate, and from time to time change, the limits of the districts of referees so that each county may constitute at least one district.

There is no provision that they must be attorneys at law, only they must be "competent to perform the duties of that office" and not hold any office of profit under the laws of the United States or any State, other than commissioner of deeds, justices of the peace, masters in chancery, or notaries public, be not related to the judges within the third degree of consanguinity or affinity, and residents of the territorial districts for which they are to be appointed.

This is a very radical change over the Act of 1867. It allows the appointment of at least four times as many referees as there were Registers. In 1878 there were 12 Registers in Bankruptcy covering 46 counties in the western district of Pennsylvania, and they were required to be a "counsellor of the District or State Court of record."

They shall declare the dividends; examine the schedules, and where defective, have them amended; give all information; send notices to creditors; make up records embodying the evidence in all matters contested before them; prepare and file the bankrupts' schedules of property and list of creditors, where the bankrupt fails, refuses or neglects to do so; safely keep all the records and transmit them to the clerks when the cases are concluded; transmit to the clerks all papers that may be needed in court; take the evidence submitted when there is no stenographer present; attend the clerk's office to receive the papers filed with him; exercise the powers of the judge for taking possession and releasing of the property of the bankrupt, where the judge is sick; and consider all petitions referred to them by the clerks and make adjudications or dismiss the petitions, and for all this referees shall receive respectively as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to the creditors upon the confirmation of a composition.

It is perfectly absurd to allow only such a small fee for services which will require the entire time of a referee in the larger cities. Under the Act of 1867, in this district there were 4233 cases filed in 11 years and distributed among 12 Registers in Bankruptcy. That would allow each Register 32 cases a year or \$320, and what he could make out of his one per cent. commission. I have not the figures before me, but a case was considered *big* where \$1,000 was divided among the creditors. I am settling up one case now where the petition was filed in 1877, and referred to Register Noah W. Shafer. There was a big fight over the election of the assignee; then objections were filed to the bankrupt's discharge and testimony taken over that and other matters in controversy, and finally, after Register Shafer resigned, the case was referred to me, and the assignee filed his account

showing a balance of \$820 to divide among the creditors. \$8.20 would be the commission of one per cent. to pay the two Registers for all our work in addition to the \$10 deposited.

The creditors at the first meeting elect a trustee who takes charge of the estate, collects the assets and pays out the dividends after the referee has declared them, for which he receives \$5, deposited in each case, and five per cent. commission on the first \$5,000 collected, two per cent. on the next \$5,000, and one per cent. on all over \$10,000.

Both referees and trustees shall give bond not to exceed \$5,000 for the faithful performance of their official duties.

The creditors shall hold a meeting not less than ten nor more than thirty days after the filing of a petition for the election of a trustee at which the judge or referee shall preside.

Creditors are allowed to vote in the same manner as under the old act, by making affidavit to their claims, and shall be allowed ten days notice by mail of all proceedings to sell the property, discharge the bankrupt, to pay dividends, etc.

A petition to have a debtor declared a bankrupt must be signed by three or more creditors whose claim aggregate \$500 or more.

By the debate in the House this was amended requiring these creditors to give bond for any damage that might ensue from their filing the petition against the debtor. In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

Dividends must be declared within thirty days.

This bill is to take effect six months after its passage.

From my long experience in connection with the Act of 1867 I should judge that this new act would work very much like the old one—if the creditors attend the meetings and elect good men as trustees, who will manage the estates properly they should get good results, but if they neglect their duties, as the most of them used to do, then only they themselves are to blame for the small dividends. If a man is unfortunate and honest he has a chance to be relieved from the burden of his debts, give everything to his creditors and start anew in life.

ALBERT YORK SMITH,
Register in Bankruptcy.

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PITTSBURGH, PA., DECEMBER 9, 1896.

Supreme Court, Penn'a.

REESE et al. v. WILDMAN.

A. died in 1862. In 1872 an administrator was appointed and petition filed, and the land sold on order of court for the payment of debts. The sale was confirmed by the Orphans' Court. Thirty years afterward certain heirs of A., who were minors at the time of sale, bring ejectment. *Held*, that no title passed under the Orphans' Court sale. The Orphans' Court was without jurisdiction, as at the time of sale the property belonged to the heirs of A. and was not subject to the lien of A.'s debts, and no act of the Orphans' Court could take it away from them.

STERRETT, C. J., and MITCHELL and FELL, JJ., dissent.

Appeal of Cassa Jane Reese and John J. Smith, plaintiffs, from the judgment of the Court of Common Pleas of Greene county, in an action of ejectment brought by them against William Wildman.

The facts of the case are stated in the opinion of the Supreme Court, *infra*.

The plaintiffs requested the court to charge the jury as follows:

1. That if the jury believe from the evidence that James Smith died on May 4, 1862, and the application for an order to sell the real estate in question was not made to the Orphans' Court until June 10, 1872, then an undivided two-fifths of the land in question had passed to Cassa J. Smith, now Reese, and John J. Smith, absolutely, and the said Orphans' Court was without jurisdiction to order sale, and the sale made in pursuance of such order would pass no title to the purchaser as to said undivided two-fifths; and their verdict should be for the undivided two-fifths of the land described in the writ in favor of the said Cassa J. Reese and John J. Smith. *Refused*.

2. The Orphans' Court was without jurisdiction to order the sale in question at the date of said order, and the sale in pursuance thereof passed no title to the land in question to the purchaser. *Refused*.

3. There is no such evidence in the case as would estop the plaintiffs from recovering the land in question by reason of their acquiescence in the alleged improvements on the land in question. *Refused*.

4. Under all the evidence in the case the verdict of the jury should be for the plaintiffs for an undivided two-fifths of the land described in the writ. *Refused*.

The defendant requested the court to charge the jury as follows:

1. It appearing from the evidence that the defendant's title to the land in dispute is founded upon a petition for the sale of the lands of James Smith for the payment of his debts, made by his administrator in the Orphans' Court of Greene county, Pa., the issuing of an order of sale to administrator of said decedent by that court and a return of the same by the administrator and a decree of confirmation of a sale to William Lipencott unappealed from; that proceeding and the decree of the said court cannot be attacked by a collateral action in another court, excepting only for fraud or want of jurisdiction in the Orphans' Court appearing upon the records of the court. *Affirmed*.

2. The defendant in this case is a purchaser without notice, as to want of jurisdiction in the Orphans' Court unless the same is shown by the records of that court, and therefore the verdict of the jury must be for the defendant. *Affirmed*.

3. Under all the evidence in this case the verdict of the jury must be for the defendant. *Answer*.—"We will affirm this point and direct that a verdict be taken for the defendant."

Verdict and judgment accordingly.

Plaintiffs appealed, assigning for error the answers to the above points.

For appellants, Ray & Axtell and Iams & Brock.

Contra, W. A. Hook and James E. Sayers.

Opinion by WILLIAMS, J. Filed November 9, 1896.

The question whether under all the circumstances surrounding the parties to this action it is, or is not, conscionable on the part of the plaintiffs, is not now before us. The evidence inclines us to think that the circumstances as there presented, while not amounting to an estoppel at law, are entitled to consideration *in foro conscientie*. But the assignments of error present only a dry question of law to us. Was the Orphans' Court sale of the real estate now in controversy, made in October, 1872, operative to pass the title to the purchaser? This must depend upon whether the Orphans' Court had jurisdiction over the land to order its sale, and upon the legal effect of the order and of the decree of confirmation.

Smith died in the spring of 1862, leaving to survive him a wife and five children. He was at the time of his death the owner of the farm

which is the subject of this action. No administrator was appointed. His sister, Mrs. Lippencott, had lent him money to the extent of five hundred dollars, or thereabouts, which he had paid upon the land when he obtained his deed. For this money no security was given by him. He had not repaid it at the time of his death, and the widow and such of the children as were of age made some arrangement with Mrs. Lippencott under which she took the farm in payment of her debt. When she came to sell it, the purchaser objected to the title for the reason that two of the five children were still minors and their title had not been secured. To remedy this defect in the title and for no other purpose, an administrator upon the estate of Smith was appointed in 1872, ten years after his death, and an application at once made for leave to sell the farm at administrator's sale for the payment of the debt which had been due Mrs. Lippencott.

The land had been relieved from liability for this debt at the end of five years after the death of the decedent by the operation of the Act of February 24, 1834. The debt had been barred by that statute of limitations at about the same time; but without any inquiry as to the time of Smith's death or the time when the alleged debt was contracted, an order of sale was granted, a sale was made by the administrator to Mrs. Lippencott's husband, the money applied upon her debt, and the sale duly confirmed by the Orphans' Court.

The defendant holds under this sale and is in actual possession. The plaintiffs bring this action as heirs at law of Smith, their father, and claim to have title by descent, and the operation of the Act of 1834. The defendant replies the Orphans' Court sale and the conclusive character of the decrees of that court under which the sale was made and confirmed.

The learned judge of the court below took the defendant's view of the case and held the decree of the Orphans' Court to be conclusive not only of the regularity of the proceedings, and the power of the administrator to sell and make a deed, but also of all claim by the plaintiffs upon the land.

In support of this doctrine the defendant cites *Sager v. Mead*, 171 Pa. 349, and kindred cases, in which this court has declined to investigate the regularity of the preliminary proceedings, after an administrator's sale had been actually made under an order of the Orphans' Court, been regularly returned to the court, and approved by it. The leading case upon this subject is *McPherson v. Cuntiff*, 11 S. & R. 422. In that case the administrators were appointed soon after the

death of the decedent in 1795. The sales complained of were made in the same year and in 1796, for the payment of debts and the support of minor children. Some minor irregularities in the proceedings were alleged, but the chief objection made to the sale was that the decedent had a living wife in Ireland at the time of his marriage to the mother of his children in this country, of which nothing had been known when the sales were ordered and confirmed. This court held, in an elaborate opinion by Justice DUNCAN, that the title taken by the purchaser was the title of the decedent, and that the court had jurisdiction over the subject matter, and its decrees were therefore conclusive upon the subject covered by them. The reason for so holding he stated in these words: "The principle on which I hold the sentence or decree of the Orphans' Court conclusive is, that it is a general rule of our law that when any matter belongs to the jurisdiction of one court so peculiarly that other courts can only take cognizance of the same subject incidentally and indirectly, the latter are bound by the sentence of the former and must give credit to it."

This makes the conclusiveness of the judgment or decree depend upon the jurisdiction of the court pronouncing it; and the converse of this proposition is equally clear that a decree of any court is a nullity which is pronounced upon a subject over which the court has no jurisdiction. This is elementary law. It was no new doctrine announced by this court in *Torrance v. Torrance*, 53 Pa. 505, when we said, "Want of jurisdiction in the Orphans' Court is as fatal to its proceedings as to those of any other court." It is not indispensably necessary that the want of jurisdiction should appear affirmatively on the record. Ignorance of the law excuses no man. If an Orphans' Court should entertain a petition in divorce, hear the testimony and make a decree, the whole proceeding would be a nullity for want of jurisdiction, but it would be necessary to go behind the record and consult the statutes before the want of jurisdiction would appear.

In *Torrance v. Torrance*, *supra*, the executor presented his petition to the Orphans' Court for leave to sell real estate for the repayment to himself of money paid to a legatee, and for the payment to another legatee of a judgment recovered by him against the executor for a balance due him upon his legacy. The legacies had been charged by the will of the testator on certain real estate. The court without inquiry directed the sale, and subsequently made a decree of confirmation and the deed was delivered. But in an action of ejectment we held the sale

to be void. The court had under the will no jurisdiction over the land and therefore its decree was without conclusiveness and void. None of the facts that avoided the sale appeared on the record except the fact that the sale was sought in order to pay legacies. The terms of the will and the want of statutory power to sell for such a purpose, had to be sought outside the files of the court, and the recitals upon its dockets. How does this doctrine apply to the case now before us?

The statute gives the Orphans' Court power to authorize the administrator to make a sale of the real estate of a decedent in order to pay debts that cannot be paid out of the personal property. The administrator has no power over the land by virtue of his office. The land is made assets in his hands only when this becomes necessary for the payment of debts, and he must go to the Orphans' Court for leave to sell. He must satisfy that court that there are unpaid debts that are properly chargeable, under the law, to the land because the personal estate is insufficient to pay, and the court will thereupon authorize him to make the sale. If there are no debts he cannot sell, nor can the court give him power to sell, unless it be for some other statutory reason. The existence of debts is a jurisdictional fact. In this case the debt was not secured by lien, and under the Act of 1834, it had ceased to be chargeable to the land, and that had passed to the heirs at law absolutely free and discharged from it. It was not in the power of the administrator, or of the court, or both together, to defeat the positive provisions of the Act of 1834 or to fasten upon that land that had descended to the heirs, this debt which for more than five years had ceased to be a charge upon it. This has been so often held by this court that it ought to be no longer debatable. In *Penn v. Hamilton*, 2 Watts, 53, it was held that although the debt might have been reduced to judgment against the administrators, yet if not regularly revived "the lien is lost whether the land be in possession of devisees or purchasers from devisees," after the lapse of five years. In *Quigley v. Beatty*, 4 Watts, 13, the single point ruled is stated in these words: "The debt of a decedent does not remain on his estate in the hands of an heir longer than seven (now five) years." The statute was characterized in *Kerper v. Hoch*, 1 Watts, 9, as a statute of repose and the lapse of time fixed as operating to discharge the land from the debts of the decedent whether in the hands of purchasers, heirs or devisees. The last case was cited with approval in *Hemphill v. Carpenter*, 6 Watts, 22, and it was there further held that knowledge of the debts by the

heir, or even a promise by the heir, that the debt shall remain binding on the land would not change the rule or relieve against the statute. See also *Loomis' Appeal*, 29 Pa. 237; *Kessler's Appeal*, 32 Id. 390; *Foster's Appeal*, 32 Id. 495; *Buehler v. Buffington*, 43 Id. 278. Such debts will not justify an order for the sale of real estate for payment of debts: *Pry's Appeal*, 8 Watts, 258. The same rule is stated in *Bindley's Appeal*, 69 Pa. 295, with the further proposition, that previous orders of sale within five years of the death of the decedent would not extend the lien of his debts beyond the period fixed by the Act of 1834, and it was also held that, "The principal intention of the 24th section of the Act of 1834 was to promote security in titles in heirs, devisees and purchasers. No admissions however solemn will dispense with an action."

The effect of a sale for payment of debts made after the five years had expired under an order that was granted before the end of the five years, was suggested but not decided in *Craig's Appeal*, 5 W. N. C. 243, and *Bowker's Estate*, 6 Id. 254. A sale under an order of the Orphans' Court passes only the decedent's title: *Kline's Appeal*, 39 Pa. 463; *Bickley v. Biddle*, 33 Id. 276. The rule applicable to all judicial sales is *caveat emptor* as to the title acquired. It has been distinctly held that the rule applies to Orphans' Court sales and that disappointment in the title is no ground for relief: *Bashore v. Whisler*, 3 Watts, 490; *Bickley v. Biddle*, 33 Pa. 276; *Vandever v. Baker*, 13 Id. 121. The purchaser at an Orphans' Court sale is also bound to see that the proceedings are sufficiently regular to authorize the sale: *Larrimer v. Irwin*, 4 Binney, 104. But all mere irregularities are cured by the decree of confirmation, which is an adjudication that the sale was made under the authority of the court: *Potts v. Wright*, 82 Pa. 498. But want of authority cannot be cured. Thus the confirmation of a sale ordered to pay legacies was held to be void for want of power to order the sale: *Torrance v. Torrance*, *supra*. The law does not authorize any such proceeding. An unauthorized decree of an Orphans' Court for the sale of lands will not stand until reversed in a regular course of appeal, but may be questioned in a collateral suit by or against a person claiming under that decree: *Messinger et al. v. Kintner*, 4 Binney, 97; *Snyder v. Snyder*, 6 Id. 483; *Sager v. Mead*, 164 Pa. 125.

The plaintiffs have shown a title derived by descent from the decedent, which had been relieved from his debts under the Act of 1834, for more than five years. This was a title that the Orphans' Court had no power to take from

them. They were the holders of an independent, and, as to these creditors, an adverse, title to the land, and stand in the same position so far as the right to deny the jurisdiction of the Orphans' Court over their title, as would any other adverse claimant. The order of sale operated only on the land of the decedent; not on that of any other person. It is because the land is a part of the estate, and is liable for his debts, that the court is empowered to order a sale. When it is discharged from the debts by a positive statute, the Orphans' Court cannot subject it again to liability. The heirs as the holders of a perfect title free from liability to all unpaid debts of their ancestor, are, as we have said, adverse claimants to the land. Their title is therefore beyond the power of the court, and they may assert it against the holder of the administrator's deed in any court in which its validity may be called in question.

In conclusion it is proper to say that the proceedings of the Orphans' Court in this case ought not to be followed. The court should be satisfied, before making an order for the sale of real estate, that there are unpaid debts properly chargeable upon the real estate of the decedent. That the real estate described in the petition is bound by the lien of the said debts; and that it is necessary to have recourse to the land to enable the administrator or executor to pay them. The most convenient way for presenting these facts to the court is to embody them in the petition, stating the date of the decedent's death, and whether the debts were at the time secured by mortgage or judgment. This practice would make such a blunder as was committed in this case impossible; it would make the duty of the purchaser easier of performance, and tend to the security and repose of titles in heirs and devisees as well as purchasers.

The judgment is now reversed, and a venire facias de novo awarded.

Eo die. STERRETT, C. J., dissenting. The real question which underlies this case is whether a purchaser is bound to look beyond the jurisdictional averments expressly prescribed by the Act of 1832, under which Orphans' Court sales are made? The facts set forth in the petition in this case are precisely those upon which the Orphans' Court is empowered "to authorize sales of decedents' real estate for payment of debts." If this be sufficient the sale was made within the jurisdiction of the court which made the decree, and collateral attack on the title thereunder is by the express terms of the act prohibited. *Prima facie*, it is sufficient. If the Legislature had thought it necessary to im-

pose other conditions precedent to the exercise of jurisdiction, it would doubtless have done so; but having specified these, the purchaser had a right to assume that they were the only essentials. While the better practice would certainly have been to have made the petition fuller, failure to do so was a mere irregularity which was cured by the decree of sale. It was not necessary that the purchaser should follow step by step the investigation of incidental details which it was the duty of the court to make. It was enough for him that the record showed those which the Legislature had made the ground of its exercise; being an innocent purchaser for value, he was entitled to protection not only from direct, but with much more reason, from collateral attack. Once concede that he must inquire into relevant facts outside those which the act requires the "application" shall "set forth," and it will logically follow that he must inquire into the truth of petitioner's averments; for the court must be presumed to pass on all the essential facts, and may as readily make a mistake in respect of one set as of the other. If in truth there would be no debt, a sale made by virtue of a decree of the Orphans' Court within five years after a debtor's death would, on this theory of construction, convey no title. The practical effect must be to seriously cripple an important branch of Orphans' Court jurisdiction, unsettle many titles, bought for value in good faith, and bring a flood of litigation.

The 57th section of the Act of March, 1832, regulating the manner of proceeding in the Orphans' Court, prescribes that it shall be on the petition of a person interested, "setting forth" facts necessary to give the court jurisdiction, etc.; the 18th section of the Act of June 15, 1836, declares that such jurisdiction shall be exercised under the limitations and in the manner provided by law; and the proceeding under which the sale was made in this case was in exact accordance with that prescribed by law.

This view was amply sustained by the authorities. The general principle which runs through all the cases is that where a court of competent jurisdiction assumes to proceed, its record must set forth such facts as show jurisdiction; but it is not necessary that it set forth all the facts out of which jurisdiction springs. The application of this principle has given rise to the rule of evidence which is embedded in the maxim "*omnia præsumuntur rite esse acta donec probetur in contrarium*," and nothing but want of jurisdiction, apparent on the face of the record, or fraud, are recognized as a basis of question. The Act of 1832, in which it was enacted that the Orphans' Court should be a

court of record whose "decrees in all matters within its jurisdiction shall not be avoided collaterally in any other court," was simply declaratory of the law as it stood: *Merklein v. Trapnell*, 34 Pa. 42. In the leading case of *McPherson v. Cunliff*, 11 S. & R. 422, it was held that a decree of sale made by the Orphans' Court was an implied adjudication of the legitimacy of those who had been named in the proceedings as children of the decedent, which the heirs at law were estopped from denying. "A purchaser," said Mr. Justice HUSTON, "is not bound to look whether the court is mistaken as to the facts of debts or children. * * * The court has decided that there were debts, and children to support, and no personal estate to pay the debts and support the children; and on that state of adjudged facts, they decree a sale. Beyond this the purchaser is not bound to look. The inquiries upon an ejectment are: Was there an administrator, and an order to sell such as would authorize the administrator to make sale * * *? The irregularities or mistakes of fact after sale confirmed, money paid, conveyance executed, possession for twenty years, improvements of twenty times the value of the property, fair purchasers deriving title by subsequent conveyances, cannot affect the purchasers." So it was held in *Painter v. Henderson*, 7 Pa. 48, on the same principle, that jurisdiction to award a purport to the widow in partition could not be questioned collaterally. So in *Potts v. Wright*, 82 Pa. 498, the fact that the record did not show bond given by the administrator as required by the statute was held to be an irregularity which was cured by the decree of sale. So it was held in *Shoenberger's Estate*, 139 Pa. 132, that the decision of the register, granting letters testamentary on a foreign will, implied that he had judicially found the principal part of the estate to be located in the country and "it could not therefore be made the subject of collateral attack." So it was held in *Gilmore v. Rodgers*, 41 Pa. 120, that a mistake in the interest of the parties by the decree in partition was cured by the decree. In *Grindrod's Estate*, 140 Pa. 161, where an Orphans' Court sale was sought to be set aside on the ground that the petitioner was a minor, without guardian or notice, it was refused because of a delay of ten years. "Something is due," said the court, "to the finality of judgments. The Orphans' Court after such a lapse of time has no power, unless perhaps in the case of fraud practiced upon it, to set aside the sale and vacate its own decree;" and much less can "any other court."

Numerous cases to the same effect might be cited, illustrating the application of this princi-

ple, but there are enough to show the current of decision, and sustain defendant's title. The application here was made by the proper party and set forth the existence of an unpaid debt, the insufficiency of personal estate, and the necessity of selling decedent's real estate in accordance with the directions contained in the Act of 1832; and the decree of sale was an adjudication that these averments were facts and the sale necessary. There was nothing on the face of the record to put the purchaser upon inquiry as to want of jurisdiction. He had no notice of the actual date of death; but the grant of letters and decree of sale justified him in believing it was recent. He had a right to presume that all things had been rightly done. If, in these circumstances, having in good faith paid the purchase money and retained the unquestioned and undisturbed possession for nearly twenty years, he can now be held responsible for the mistake of the court in its finding of fact, such sales are indeed, as was said by Mr. Justice HUSTON in *McPherson v. Cunliff*, *supra*, "snares for honest men."

On the other hand, these plaintiffs have no equity either for direct or collateral attack. Those through whom they claim, having certainly had at least constructive notice by advertisement, both of the sale and the account and distribution of the proceeds, must be presumed to have acquiesced, and it is now too late to question their validity. "Something is due," as was said in *Grindrod's Appeal*, *supra*, "to the finality of judgments." So far as appears the property was sold for a full price, which went for the payment of the decedent's just debts; the sale received the sanction of a court of competent jurisdiction whose peculiar duty it was to protect under the law the rights of all parties interested; and yet these plaintiffs seek to recover this property from defendant without repayment of the purchase money, with its interest, or to make compensation for the cost of valuable improvements. The injustice, to say the least, of this claim is manifest: *Klingensmith v. Bean*, 2 Watts, 486; *Jacoby v. McMahon*, 174 Pa. 133.

The cases upon which plaintiffs rely are clearly distinguishable from the present. In *Pry's Appeal*, 8 Watts, 253, and *Oliver's Appeal*, 101 Pa. 299, no sales were made, but the appeals were from orders of sale. *Bindley's Appeal*, 69 Pa. 295, involved a question of distribution of the proceeds of a sale the validity of which was conceded; in *Maus v. Hummel*, 11 Pa. 228, there was enough on the face of the record to put the purchaser on inquiry which would have led him to the knowledge of the date of the debtor's

death, and consequent want of jurisdiction; and *Grier's Appeal*, 101 Pa. 412, was ruled on the ground that the record failed to show compliance with a statutory requirement. In *Torrance v. Torrance*, 53 Pa. 505, so much relied on in support of the plaintiff's claim, want of jurisdiction appeared on the face of the record. The sale could not be sustained on the ground of the payment of debts, because there was no averment of such, nor on the ground of the payment of legacies, because of the want of proper parties; but, in deciding thus, this court was careful to note the alternative presumption of validity. "We are not unmindful," said Mr. Justice AGNEW, "that general jurisdiction over the subject protects the decrees of the Orphans' Court from being assailed collaterally. But this is not such a case. Had the application been to sell the testator's estate for his own debts, their existence might be presumed; or had it been to sell the devisee's estate for the payment of legacies charged upon it, the want of authority in the executor to petition would have been but an irregularity." This analysis of cases, upon which plaintiffs' claim of title is mainly rested, shows that the right of collateral attack on decrees of Orphans' Courts was recognized because, and only because, of want of jurisdiction apparent on the face of the record; and that they afford no color for the proposition that purchasers at Orphans' Court sales must, at their peril, inquire into relevant facts outside of those which the statute prescribes as the basis of jurisdiction.

It will thus be seen that the sale in this case was within both the letter and the spirit of the law, and that the defendant was an innocent purchaser for value entitled to protection.

MITCHELL and FELL, JJ., concurred in the dissent.

Court of Common Pleas No. 2.

ERDELYI et ux. v. BERNAT et ux.

A married woman's contract to trade real estate is not binding under the Married Woman's Property Act of 1893 without an acknowledgment separate and apart from her husband.

Gross inadequacy of price is not sufficient to upset a contract, but it is a fact to be considered in connection with other facts.

Where a married woman makes a contract to buy property for a price twice its value and misrepresentations are made as to the amount of liens against the property to a very large amount and no offer to remove the liens is made and the woman cannot talk English, the contract being made by her husband, the contract will be set aside although she knew the property and was warned that she was paying too much for it.

No. 590 Oct. T., 1896. In equity.

This case came on to be heard on bill, answer and replication, and testimony taken on the 10th, 11th and 12th days of November, 1896, and on the 13th day of November, 1896, was duly argued by counsel.

History of the case and findings of fact by EWING, P. J. Filed November 18, 1896.

The plaintiff, Mary Erdelyi, wife of George Erdelyi, in March, 1896, was the owner of the lot of ground with a house erected thereon, situate in the township of Braddock, near the borough of Braddock, described in the first paragraph of the plaintiff's bill. Mary W. Bernat, wife of John Bernat, was, at the same time, owner of a lot of ground in the First ward of the borough of Braddock, fronting 25 feet and 8 inches on Halket street and extending back 133 feet, preserving the same width to Wood alley. On the rear end of that lot, fronting on Wood alley, was a frame house, and on the front end, on Halket street, was a small brick dwelling house. The main part of the frame house was old, with an addition built within a few years, and the brick house was a comparatively new house. John Bernat had been the owner of this whole lot, and conveyed it on the 3d day of September, 1894, to his wife.

The parties to this suit are Slavonic Hungarians. The two men, and probably the women, were acquainted with each other in Hungary. Bernat had been located at Braddock for eleven years and Erdelyi for nine years. The Erdelyis were at this time living in a rented house on Wood alley, nearly opposite the premises of Bernat. They had negotiations in relation to an exchange of properties, which resulted in a written agreement for exchange, made some time in the month of March—the precise date does not appear—which was surrendered and destroyed, and the agreement of the 21st day of March, 1896, a copy of which is "Exhibit A" of plaintiff's bill, was entered into at the office of Fred. W. Edwards, justice of the peace, and was in his presence signed by the parties, the husbands signing their own names and the wives signing by mark, and witnessed by Edwards, by which Mrs. Erdelyi agreed to convey her lot in Braddock township to Mrs. Bernat in exchange for the rear half of the Bernat lot fronting on Wood alley, being a lot 26 feet and 8 inches wide (although called 25 feet and 8 inches in the agreement) and extending back 66 feet, on which was erected the frame house, "subject to a mortgage of \$760;" Mrs. Bernat to take the lot in Braddock township, subject to a mortgage of \$402.50 and a judgment of \$301.79; Mrs. Erdelyi to pay, in addition, the sum of

\$1,150, \$250 of which had actually been paid before the written agreement had been entered into, and \$800 payable every three months thereafter.

A large amount of testimony has been taken in this case, a considerable part of it being rather unsatisfactory, the wives not talking English at all and the husbands talking it indifferently, although Bernat talks English much better than Erdelyi; and a number of the other witnesses had to give their testimony through an interpreter. The testimony is very contradictory, and in some respects it is very difficult to tell which party, if either, is telling the whole truth. In this condition of the testimony we place much greater reliance on the testimony of Squire Edwards and one or two witnesses who could talk English and Slavish both than we do on the other testimony. We fix the values of these properties by the testimony of witnesses and from descriptions of the properties, using our own judgment. Squire Edwards is in the real estate business and is entirely familiar with the properties and from his testimony and the other testimony we are satisfied that his estimate of the values of the two properties is about correct. The property owned by Mrs. Erdelyi in Braddock township was worth \$1,000 to \$1,100; the property proposed to be conveyed by the Bernats to Mrs. Erdelyi was worth \$1,200 to \$1,300. That is the estimate of Mr. Edwards; I would find the value of the Braddock township property to be \$1,000 and the value of the Wood alley property to be \$1,200. I am satisfied that that is as much as they would have sold for at ordinary sale, and is about the relative value of the properties. There was, then, \$200 difference in the value of the properties, and yet Mrs. Erdelyi was to pay \$1,150 in money (the full value of the property) and also assume an indebtedness of \$760, as against \$704.29, and give her lot in addition—a very gross inequality and a very one-sided bargain.

The plaintiffs in their bill allege that the transfer was procured by John Bernat, acting as the friend of Erdelyi, getting him intoxicated, having him drink liquor and beer, and prevailing on him to make this trade. The evidence shows that the two men were drinking together and drank together frequently, Erdelyi perhaps drinking more than he should have done at different times; but it fails to establish the charge that he was drunk at the time the contract was made or that the exchange was procured by plying him with drink. The evidence further shows that this negotiation had been going on for sometime; that the original

contract made was to require Mrs. Erdelyi not only to pay the \$760, alleged to be the encumbrance on the Bernat property, but also to pay the \$704.29 against the Braddock township property, making her pay, in value of property and in money, about \$8,000 for property worth \$1,200. That agreement had also been drawn up by Squire Edwards, and at the time it was drawn up he told Mr. Erdelyi, at least, that it was wrong and told Bernat that he should not make such a contract, that it was unjust; but they made it.

Afterwards Mrs. Erdelyi objected and wanted to get back her \$250, which Bernat refused to give up, and in a few days thereafter this agreement of the 21st day of March was drawn up at the squire's office. It had been discussed beforehand and I think it probable, although the testimony is somewhat contradictory, that the two men and Mrs. Bernat went to the office of the justice of the peace to have the contract drawn. Mrs. Erdelyi was sent for, by a man who was an officer, but was sent as a messenger for Mrs. Erdelyi, the squire saying very properly that it was necessary for her to be present if the transfer was to be made. Mrs. Erdelyi says that she understood it to be a demand from the squire, enforced by sending an officer after her, to go there and make the contract. When there, the matter was discussed. The bargain in relation to the matter, and especially on the part of the Erdelyis, was on the part of the husbands rather than the wives; and Squire Edwards in his talk and advice seems to have discussed it with Mr. Erdelyi, but very little was said to Mrs. Erdelyi and there appears to have been but little account taken of her, or of either of the women, at the office. The men were the principals in making the contract. Mr. Edwards, knowing that the contract was exceedingly one-sided and unjust, or indiscreet on the part of the Erdelyis, again urged Mr. Erdelyi not to enter into that contract, saying that the property was worth much less than he was paying for it. Whether or not this was communicated to Mrs. Erdelyi, does not appear. Erdelyi replied that Bernat was his friend and would not cheat him; Bernat said he was their friend. The contract then written was signed, notwithstanding the warning of Squire Edwards to Mr. Erdelyi, that he was entering into a very one-sided contract. The representation in regard to the liens on the Braddock township property of the Erdelyis was correct. Mr. Bernat represented, and it is put in the contract, that the lien on the property on Wood alley was \$760, and that that was all that was against it. Mrs. Erdelyi says that he told them

when the contract was made, before it was written, that it was only \$600, but at the squire's office it was stated to be \$760, and that is the amount put into the written contract. On the 30th day of May \$300 additional was paid by Mrs. Erdelyi to Bernat. Whether all this was paid directly to Bernat, or whether a portion of it was paid on his dues in the building and loan association, is left in some doubt. Mrs. Erdelyi's testimony would be to the effect that \$70 in addition was paid on the building and loan association dues. At the time that the representation was made that there was only \$760 against the property of Bernat, there was, in fact, standing open a mortgage for \$1,000 on the whole lot, running from Halket street to Wood alley, and also another mortgage for \$2,200 to the building and loan association, and also a judgment for \$121.

The Bernats took possession of the Braddock township property and moved into it at the first of May, 1896, and sometime thereafter, the precise date not being fixed by any one, the Erdelyis moved into the Wood alley property, where each of the parties still remains.

Sometime after the payment of the \$300, Mrs. Erdelyi, going to the building and loan association which was supposed to hold the mortgage against her newly acquired property, to pay on that indebtedness, was informed that there was much more against the property than was alleged. She says she paid \$70 on account, and she or her husband called on Squire Edwards and told him about it, and he made an examination of the record, which resulted in finding these mortgages. Mrs. Erdelyi then demanded the return of her money and the rescission of contract, which was refused by Bernat.

This bill was filed on the 10th day of September, 1896. On or after the 14th day of September, Bernat and wife tendered a deed to Mrs. Erdelyi for this property in which they recite that it is subject to the mortgage of \$760. At that time \$300 of the \$1,150 was due. All these liens against the Bernats were still open and unsatisfied on the record, amounting, on their face, to \$3,321. On the 21st day of September, 1896, the \$1,000 mortgage was satisfied, and, according to the evidence, the judgment of \$121 has been paid except costs. The proper evidence of the payment, so far as the purposes of this case are concerned, would be the satisfaction of the record, and that is unsatisfied as yet. According to the testimony, there was due on the mortgage of \$2,200 on this whole property, at the time the deed was tendered, \$1,875.16, and no attempt has been made to have that mortgage removed from the property, nor does it

appear that the defendants are in a position to have the mortgage released as to all except \$760. The officer of the building and loan association holding the mortgage, who was called by the defendants, says that no such suggestion was made; and I understood him to say that they would not accede to any apportionment of the mortgage. In fact the \$2,200 of a mortgage leaves but little margin of value on the property. The defendants are not in a position to make a conveyance of the property. The \$550 paid ought to have gone to the reduction of the mortgage, if they expected to carry out the contract. The judgment of \$301.79, held by Joseph Wolf against the Erdelyis, was paid by Mr. Bernat, by Wolf surrendering and cancelling the note of the Erdelyis and taking the note of Bernat and wife, and this, for the purposes of this case, is equivalent to paying it in money. Mr. Bernat testifies that he paid \$7.50 a month to the building and loan association, since he went into possession of the property on the first day of May, which would be about \$45. The dues of the Bernats in the building and loan association were considerably in arrears at the time this contract was made, according to Mr. Brubaker, and notwithstanding the payment of over \$70 by Mrs. Erdelyi there was, at the time of the filing of this bill, \$202.48 in arrears for dues, fines and interest, over and above the payment of \$70 by Mrs. Erdelyi, and the mortgage, under its terms, was overdue and liable to be foreclosed at any time.

Mr. Erdelyi was very anxious to make this trade. He relied on the representations and judgment of Mr. Bernat, but as to the property itself there was no concealment nor attempt at concealment.

CONCLUSIONS OF LAW.

As to the questions of law raised by these facts, perhaps the first question is, Is a married woman bound by her contract, made in the way that this was made, without any examination and acknowledgment separate and apart from her husband?

The second question is, If it is binding on her, had the representations made turned out to be correct, is it binding in the face of the untrue representations made, in relation to the liens on the property and the facts found in relation to the existing state of affairs?

The mere inadequacy of price or excessive price is not, in itself, sufficient to set aside a contract of sale. It is always, though, a fact to be taken into consideration; and in this case there was a gross one-sidedness in the contract. While Mr. Bernat alleges that he believed their property to be worth \$2,000, yet he had actually

made a bargain at one time, by which he was to get \$3,000 for it from these people.

But there was a gross misrepresentation as to the facts, in relation to the liens on the property. Had Bernat disclosed the fact that there was a lien of nearly \$2,000 on the property at the time, it is not probable that the plaintiffs would have joined in the contract. The attention of the defendants was called to this state of affairs a considerable time before the bill was filed. They neither removed the liens from the record, nor did they make any attempt to do so, until after the bill was filed. They refused to return the money, but they had a deed prepared, tendered it, and demanded its acceptance and the payment of the money, with all these liens open of record and with nearly \$1,900 actually due on the mortgage which they did not propose to remove.

We are of the opinion that this misrepresentation, coupled with the gross inequality of the bargain and the other circumstances of the case, is sufficient to justify the plaintiffs in rescinding the contract.

The agreement of the 21st day of March, 1896, between these parties, is a contract of sale and agreement to execute a deed. Practically it is an agreement of exchange, and, if valid, it vested an equitable title in each of the parties. There was not only no separate acknowledgment of the wife, but the whole transaction was substantially with the husband. She was unable to speak English or to write.

Prior to the Married Woman's Property Act of 1887, there is no question that this agreement as to Mr. Erdelyi would be either void or voidable, the weight of authority being that it would be absolutely void, the Act of Assembly at that time requiring an acknowledgment on the part of the wife, separate and apart from her husband, after the contents of the paper were fully made known. This act has in view the protection of the wife from the importunities and coercion of the husband. It is highly probable that if Squire Edwards had, in a separate examination of the wife, made known the contents fully and told her what he had told her husband, she would have told him that she did not willingly sign. She asserts that she did not willingly sign it, and the question is, Does the Act of Assembly of June 8, 1893, P. L. 344, repeal the provision of the act requiring the separate acknowledgment of the wife?

The learned president judge of the Orphans' Court of Franklin county, in the case of *Reed's Estate*, reported in 3 Dist. Rep. 503, in an elaborate opinion, decides that since the Act of 1893 it is unnecessary to the validity of a married

woman's deed that there be any separate acknowledgment on the part of the wife, and, *a fortiori*, that there need be no separate acknowledgment to make valid her contract of sale. The learned judge concedes that under the Act of 1887 such separate acknowledgment would have been requisite. No direct decision on that point has been cited to us. In the case of *Meade v. Clark et al.*, 159 Pa. 159, a case that went up from this court, a married woman and her husband had signed a deed conveying the lot of ground in dispute, she had received the purchase money therefor, and the purchaser was in possession. There was no acknowledgment of the deed by either husband or wife. Judgments were entered against her, execution issued, there was a sheriff's sale, and ejectment by the purchaser at the sheriff's sale. At or about the time of the sheriff's sale, the husband and wife acknowledged the deed in accordance with the statute, the separate acknowledgment of the wife being taken. This court held, following what we thought was the weight of authority, that no title passed by the unacknowledged deed, that while the Act of 1887, did provide that marriage should not "impose any disability on or incapacity in a married woman as to the acquisition—or disposition of property of any kind—or her right and power to make contracts of any kind and to give obligations binding herself therefor; but every married woman shall have the same right to acquire, hold, possess, improve, control, use or dispose of her property, real and personal, in possession or expectancy, in the same manner as if she were a *feme sole*,—provided, however, that a married woman shall have no power to mortgage or convey her real estate, unless her husband join in such mortgage or conveyance," the separate acknowledgment of the married woman was still essential. The Supreme Court reversed the judgment, on the ground that the deed of the married woman with her husband joining, without any acknowledgment, was simply voidable, and that she and her husband having completed it by a formal acknowledgment in accordance with the statute, a creditor could not be heard to impugn the validity of the deed; saying that as to her, if she had seen fit to repudiate the contract, it was not binding. A distinction is made in the case of *Reed's Estate* between the two acts. We are unable to see that there is any serious difference; each of them provides that a married woman may not mortgage or convey her real property unless her husband join in such mortgage or conveyance. What is meant by the husband and wife joining in the conveyance? There is no express

repeal of the old act requiring the separate acknowledgment of the wife, and while we can see that the Act of 1887 and the Act of 1893 each would bear the construction that no acknowledgment was necessary to the validity of the deed of a married woman, and, if there had been no previous statute on the subject, that that would be the proper interpretation, yet the old established rule of the separate acknowledgment of the wife for her protection should not be swept away without a clear unequivocal legislative declaration so repealing it, and it seems to us that under the Act of 1893, as well as under the Act of 1887, the fair implication is that when it is required that the husband shall join the wife the deed should be executed as required by the former Act of Assembly. In Pennsylvania an agreement of this kind for conveyance or exchange, vests an equitable title and is, in fact, in our law, a conveyance. With the view we take of the rights of the parties, under the misrepresentations that were made and the inability of the defendants to carry out the contract, the decision of this question is not essential. It is to be hoped that at an early day there will be an authoritative decision of the Supreme Court on the subject.

The plaintiffs have paid \$550 on account of this purchase. The defendant has paid \$301.79, by lifting the Wolf judgment held against the plaintiffs. Mr. Bernat says he has paid about \$45 on the building and loan dues for the Erdelyis. He has failed to produce the book showing that, although given an opportunity so to do, with ample time to produce it. Even if he has, it would still leave him over \$200, which we will leave in his hands, and which will amply repay him for all the trouble he has had.

Let a degree be prepared by counsel, canceling the contract in question and giving a reasonable time for the surrender of the respective properties. If the parties cannot agree, we will fix the time, either as the first day of January, 1897, or, if the parties prefer, the first day of April, 1897. The defendants should pay the costs, but no witness bill to be taxed on either side.

For plaintiffs, *H. M. Scott.*

For defendants, *Archibald Blakeley and John C. Thompson.*

DRUM v. MILLAR and DRUM.

Testator devises property to his wife for life, and on her death to his children, A., B. and C. If A. should die leaving heirs their share is to be held in trust until they reach 21, and if they all die before reaching 21 then A.'s share shall go to B. and C. Held, that A., on

surviving the widow, holds an estate in fee-simple. The contingency referred to by the testator was the death of A. during the life of testator's widow.

No. 609 Oct. T., 1896. Case-stated, under will of Philip Drum.

Opinion by WHITE, J. Filed October 6, 1896.

The will of Philip Drum devised his real estate to his wife, Ellza Ann Drum, during her lifetime, "and after her death the said property to be equally divided between my sons John Drum, Wm. R. Drum, and daughter Mary Ann Drum, now Mrs. W. N. Millar. If Wm. R. Drum should die leaving heirs, his heirs are not to receive his share until the youngest is twenty-one years of age; and if his heirs should all die before the age of twenty-one years, his share, that is, Wm. R. Drum's share, will go to John Drum and Mary Ann Drum, now Mrs. Willis N. Millar; and now I consider the children of Wm. R. Drum, his heirs, as spoken of."

The word "heirs" in this devise would be considered "children" without the last sentence; but that sentence expressly declares that the testator used the word as meaning children.

The date of the will or the date of the testator's death is not stated. But it is fair to infer from the language of the devise that at the date of the will Wm. R. Drum had no children. The first clause of the devise gave the three children a fee-simple, subject to the life estate of the widow, each taking an undivided one-third. All that follows that first clause evidently refers to the contingency of Wm. R. dying before the widow. If he died leaving no children, his share was to go to his brother and sister. If he died leaving children, and they should die before arriving at the age of twenty-one years, that share should go in the same way to his brother and sister. But as Wm. R. Drum survived the widow, the contingency contemplated in this will did not happen, and the fee granted in the first clause became absolute and free from any condition.

This view of the devise is confirmed by the fact that the devise over, in both cases, is to John and Mary Ann, evidently contemplating that both would survive the contingency, and therefore it would not be very remote. The contingency was that Wm. R. should survive the widow.

We are of opinion that as Wm. R. Drum survived the widow he took an absolute fee-simple to the undivided third of the lot, and judgment on the case-stated should be entered for the plaintiff. Judgment for the plaintiff for \$2,633 and costs.

For plaintiff, *J. McF. Carpenter.*

For defendant, *J. M. Shields.*

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REESE et al. v. WILDMAN.

[From *The Legal Intelligencer*, Dec. 4.]

The recent decision of the Supreme Court (*Reese v. Wildman*, 178 Pa. —; 39 W. N. C. 193) [*ante*, p. 167], that the validity of an Orphans' Court sale for payment of debts may be impeached in the Common Pleas and the sale treated as a nullity, in an action by the heirs of the decedent against persons claiming under the purchaser (and this irrespective of lapse of time), where the decree for sale was not entered until ten years after the decedent's death, cannot fail, in its logical consequences, to have a most disastrous effect in unsettling titles, opening the door to litigation instituted for black-mailing purposes, and greatly reducing the class of bidders at Orphans' Court sales, with manifest injury to widows and orphans and all persons interested in preventing the sacrifice of a dead man's property.

Of course if debts ceased absolutely and as a matter of law to be a lien upon the lands of a debtor at the expiration of five years from his death, a sale for their payment after that time would, manifestly, be void: but the lien is not so limited, for the Act of Assembly (24th February, 1834, sec. 24) expressly declares that if (1) suit is brought within five years from the death or if (2) a written statement of the demand, where it is not yet due, shall be filed in the prothonotary's office, the lien shall, in the former case without limit and in the latter for five years after the demand shall become due, continue; while if there be a judgment obtained in the lifetime of the debtor the act, by its own terms, does not limit the lien at all. Hence the question of lien is not one of law but of fact, depending upon extrinsic evidence and requiring ascertainment and determination by the Orphans' Court before the decree for sale can properly be entered.

Of course, also, where a judgment or decree is entered in a proceeding not within the jurisdiction of the court which pronounces it, it is absolutely void; as, for example, in the case suggested in the opinion of the Supreme Court of a petition for divorce in the Orphans' Court, or a

petition in the Common Pleas for sale of real estate for payment of debts of a decedent or for specific performance of his contract. And upon this principle a sale under decree of the Orphans' Court upon *ex parte* petition of an executor, for payment of legacies charged upon lands or for subrogation to the right of the legatees paid from personalty, is absolutely void (*Torrance v. Torrance*, 3 Smith, 505,) since no Act of Assembly permits lands to be taken for such purpose except in a proceeding in the nature of a bill in equity to which devisees or heirs and legatees are necessary parties.

But the Orphans' Court has jurisdiction—exclusive jurisdiction—to decree sales, upon *ex parte* petition of executors or administrators, for payment of decedents' debts; and upon such petition it becomes the duty of the court to determine (1) that there are debts as alleged; (2) that the personal estate is insufficient for their payment; and (3) that the lands proposed to be sold are subject to their lien. Not only is it the duty of the court to make this inquiry, but this is the very purpose for which the jurisdiction was created, in order that intended purchasers might have the protection of a decree which affirmatively establishes the propriety of the sale. If it has not this effect it would have been better to let such sales be made upon the responsibility of the executor or administrator, with the duty upon the purchaser, in each case, of making all necessary inquiries; and if not conclusive in all collateral suits and proceedings, its only purpose is to entrap unwary bidders for the benefit of unscrupulous heirs. It is not to be forgotten that while good practice demands that a schedule of debts and a statement of all necessary facts should accompany and be made part of the petition for sale, the law does not require it: *exhibiting* the schedule, etc., is all that is required. As was said by Judge STRONG, in *Sliver's Appeal*, 6 Smith, 9: "It is for the information of the court, that the judges may determine whether the sale asked for is necessary or expedient. The court must be satisfied that there are debts that cannot be paid with the proceeds of the personalty. And as the court must be satisfied—as an *exhibition* of such a statement is a prerequisite to an order to sell—after an order it must be presumed that such exhibition was made." 'To be satisfied that the debts have not lost their lien is quite as much a prerequisite on the part of the action of the court as it is that they exist at all; and this may result from extrinsic proof of a judgment in the decedent's lifetime, suit within five years of his death, or the filing of a written statement in the proper office of a demand not

falling due for more than five years after the death. It has been held, indeed, that the parties in interest may waive the benefit of the statute limiting the lien of debts (*Wallace's Appeal*, 5 Barr, 103.) and as it is not necessary to make them parties to the proceedings for sale (*Weaver's Appeal*, 7 Harris, 416)—the public notice of the sale being sufficient, purchasers have the right, after decree, to assume such waiver, if in other respects the lien had ceased. That there was a waiver in the case under consideration seems extremely probable; and minors, if any, would become bound, if that should be necessary in view of the decree, by their failure to repudiate it within a reasonable time after attaining majority. What is said on this point by Mr. Justice WILLIAMS in *Dolph v. Hand*, 156 Pa. 97, is directly applicable. See also *Old's Estate*, 176 Pa. 150.

If the court proceeded to final decree upon insufficient evidence or even upon no evidence at all, the only method of correcting the error was by application to open the decree, by petition for review, or by appeal. Until reversal it was binding and not impeachable collaterally. And the decree binds minors no less than persons of full age, and their remedy must be sought in the proceeding itself and not by collateral attack. Even where the rights of third persons have not intervened, minors, even by bill of review, cannot have relief after the time when such bills are permissible (*Neill's Appeal*, 12 Norris, 177). Here the decedent died in 1862, the sale was in 1872, and the ejectment so long afterwards that the decision asserting the sale to be a nullity was not rendered until November, 1896.

The authorities upon the subject of the conclusiveness of decrees where the jurisdiction, though limited, exists as to the proceeding itself, have, heretofore, been uniform:—"Where the jurisdiction of a court of limited jurisdiction has once attached its subsequent proceedings are presumed to be regular and cannot be collaterally impeached." (See note to *Crepps v. Durdan*, 1 Smith's Lead. Cas., 8 American Ed., Vol. 1, part 2, p. 1155; *Grignon v. Astor*, 2 Howard, 319, etc., etc.) In *Grignon v. Astor*, *supra*, where the effort was to set aside, collaterally, a sale ordered by a county court under a law of Michigan giving jurisdiction in certain cases to order sale of real estate of decedents for payment of debts, it was said by Judge BALDWIN (p. 340) in an opinion concurred in by Judge STORY, Chief Justice TANNEY and all of the Judges of the Supreme Court of the United States, in which the question of jurisdiction was elaborately considered: "The petition * * called

for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved; they decided that they did so appear, whereby their power was exercised by the authority of law and it became their duty to order the sale. * * * After the court had passed on the representations of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court; their order of sale is evidence of that or any fact which was necessary to give them power to make it. * * * This is a familiar principle of ordinary adversary actions, in which it is presumed after verdict that the plaintiff has proved every fact which is indispensable for his recovery, though there is no evidence to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject-matter. The granting the license to sell is an adjudication upon the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree it is conclusive upon all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence. * * * A purchaser is not bound to look beyond the decree; if there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them power to hear and determine the case before them, the title of the purchaser is as much protected as if the judgment would stand the test of a writ of error; so when an appeal is given but not taken in the time prescribed by law."

If in the case decided by our Supreme Court, the record, notwithstanding these well settled principles, may be contradicted as to the fact of the non-expiration of lien, it may be equally contradicted as to the fact of insufficiency of personal property or the existence of indebtedness; and as was said in *Grignon v. Astor*, *supra*, quoting from *McPherson v. Cuntiff*, 11 S. & R. 422, Orphans' Court sales become mere "snares for honest men."

In view of the great importance of the case as affecting questions of title and of the fact that it was decided by a bare majority of the court, reversing the court below, with a very strong dissent by Chief Justice STERRETT, concurred in by Judge MITCHELL and Judge FELL, it is most earnestly to be hoped that a reargument will be applied for and granted. C. B. P.

Supreme Court, Penn'a.

KLEIN v. THE LIVINGSTON CLUB.

A member of a club may maintain suit to enjoin its commission of an alleged indictable misdemeanor, where commission of the act, if it be such a misdemeanor, will probably damage property rights of his in the club.

The furnishing by a club to its members of liquor, each paying the cost of what he consumes, is not a sale, within Act May 13, 1887, making sale of liquor without license illegal.

WILLIAMS, J., dissenting.

Appeal of William R. Klein, plaintiff, from the decree of the Court of Common Pleas of Lehigh county, dismissing a bill in equity, filed by William R. Klein against The Livingston Club of Allentown, Lehigh county, for an injunction to restrain the steward and governors of said club from furnishing and distributing spirituous and malt liquors to the members of the club.

The facts of this case, which was heard upon bill and answer, are set forth in the opinion of the Supreme Court.

The judge of the Common Pleas of Lehigh county being a member and part owner of the property, of the club (and having expressed opposition to the proposed keeping and selling of liquors to members), argument was heard before SCHUYLER, P. J., of the Third Judicial District, who dismissed the bill.

Whereupon the plaintiff took this appeal, assigning for error this action of the court.

For appellant, *James B. Deshler*.

Contra, *Edward Harvey, R. E. Wright and M. L. Kauffman*.

Opinion by DEAN, J. Filed October 5, 1896.

The plaintiff is a member in good standing of the Livingston Club of Allentown, Lehigh county. The club was duly incorporated April 7, 1890. Its purpose, as declared by its articles of association, is the social enjoyment of its members by friendly intercourse. It is the owner of a lot in the city, on which is erected a valuable brick building, containing parlors, reception room, library room, banquet hall, dining room, kitchen, committee rooms, billiard rooms, and private rooms occupied by the club steward and servants. The cost of the building and grounds was \$23,000. The membership is limited to one hundred residents of the city, or resident not exceeding one mile beyond, and all must be over twenty-one years of age. There are no sleeping rooms in the building for members or guests, but some of the members not

having families, make the club their home during club hours. No games of chance are permitted. The affairs of the club are controlled by a president, vice-president, secretary, treasurer, and twelve governors, known as the governing committee. Immediately before the filing of this bill, this committee adopted this resolution:—

"*Resolved*, That the steward be directed to purchase a stock of spirituous and malt liquors, etc., and furnish the same to the members of this club, and receive pay therefor from them, only, and turn over the moneys so received to the treasurer of said club, which money shall be again used to replenish the liquors, etc., so furnished to its members, and in the purchasing of eatables, cigars, etc., and also for the defraying of the expenses connected therewith."

Plaintiff admits in his bill, the club receives no profit on liquors so furnished, but he avers the steward is about to carry out the directions of the resolution; that the proposed action will be a violation of the license laws of the Commonwealth, thus putting in peril the charter of the club, which may be forfeited, and, in consequence, he as a member having an interest in the club property, will be thereby damaged. He therefore prays for an injunction restraining the steward and the governors from carrying out the resolution.

The purpose of the bill is to enjoin defendants from the commission of an alleged indictable misdemeanor, because the misdemeanor, if committed, will probably damage his property rights. A bill having for its sole purpose an injunction against crime or misdemeanor, it is well settled, does not lie; but it is just as well settled that equity will interfere if the alleged criminal acts go further, and operate to the destruction of or diminution of value of property. This case and that of *Manderson v. Bank*, 28 Pa. 379, are alike in their essential facts. In the bank case the law authorized the directors to discount paper at a rate not exceeding one-half of one per cent. a month. Manderson, a stockholder, averred that the president and cashier were in the habit of meeting after banking hours, and passing paper for discount at a rate exceeding the lawful rate; thus violating the usury laws, and subjecting the bank to the penalty therefor, and putting in peril the bank's charter. Therefore his property interest in the bank was endangered. It was decided a stockholder had the right to prevent by injunction a practice which might produce such injury to him, and the writ was awarded. In *Sparhawk v. Railway*, 54 Pa. 401, the writ was refused by a majority of the court, because the sole purpose of

the bill was to prevent an alleged violation of the Act of 1794, in which question the complainant had no other interest than that of the public generally.

If either the commission of the act here alleged or its criminality depended on the evidence of witnesses, we might well leave it to the proper criminal court for determination. The hand of a chancellor would not be put forth to restrain the commission of what might not be intended as, or what, if actually done, might not be criminal, because of the absence of criminal intent. But here the declared purpose to commit the act complained of is admitted. Whether it be criminal, if committed, is a pure question of law, for defendant's only plea is that the proposed act is not in violation of law.

Would the act, when committed, be a sale of liquor? That is the only question, for it is not alleged it is the purpose of defendant to furnish liquor to persons of intemperate habits, to those visibly intoxicated, or to minors. The Act of May 13, 1887, known as the "Brooks Law," is entitled "An Act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors or any admixture thereof." This is a license act, and prohibits the keeping of any house, room or place, inn or tavern for sale of liquors, without a license first had and obtained. It further prescribes the mode of procedure in all its details, to obtain license to sell, and prohibits the sale or gift either by licensed dealers or unlicensed dealers on certain days, and to certain classes. Our Brother WILLIAMS, in *Com'th v. Carey*, 151 Pa. 371, referring to the title of the act and the body of it has so clearly stated its purpose that his reasoning and conclusion are almost as demonstrative of the truth as the solution of a problem in geometry. He says: "There is no hint of a purpose to restrain and regulate the use of them by private citizens in their own dwellings. We look next into the body of the act, and there we find a comprehensive license system. We have first a restriction of the sale to persons holding licenses, and punishments prescribed for sale of unlicensed persons. Next, the proceeding to obtain a license. Third, the provisions regulating the exercise of judicial discretion in granting or refusing license. Fourth, penalties for violation of the law by licensed dealers. Fifth, exceptions from the power to sell conferred by a license, as to certain days and certain classes of persons. The seventeenth section belongs to this class of provisions. To the excepted classes and upon the excepted days no man can lawfully sell or furnish for use as a beverage any intoxicating liquors. The unlicensed cannot,

for the traffic is wholly forbidden to them. The licensed cannot, for an exception as to these is made in the law under which the license is granted. If notwithstanding the prohibition, any person does sell or furnish contrary to the seventeenth section, his conduct is a misdemeanor, and the house, room or place kept or maintained by him for such unlawful sales or furnishing may be abated as a public nuisance under the provisions of the eighteenth section.

"These provisions are not applicable to the table, or the personal habits of the citizens within the precincts of their own homes, and they cannot be extended by any known rule of interpretation, so as to include them. The furnishing of liquors on Sunday, or to any of the excepted classes, that is made punishable, is a furnishing in evasion of the law forbidding sales. It would be of little avail to close the bars on election days if candidates might open rooms near the polls and furnish liquors free to voters. It would not help the cause of good morals, if those who were forbidden to sell on Sunday could under some specious pretext profess to supply their customers without charge on that day. But if for reasons of health or habit, one chooses to supply his own table with his own liquors for use by himself, his family or his guests on Sunday, there is not now, and so far as I am aware, there has never been in this State any statute forbidding him to do so."

The Brooks law only reduced to a comprehensive system all the features of all the license laws at its date on our statute books. There is not in it, nor in any of the statutes which it replaces, a prohibition of the use of liquors in clubs, any more than there is a prohibition of its use in a family. No indictment for furnishing liquors to members of a club could be sustained unless the evidence showed beyond reasonable doubt that such furnishing constituted a sale. The statute being penal, it must be subject to a strict construction. We cannot extend it beyond its letter. If we, in construing the Brooks statute, adopt the settled rule of construction, consider the old law, the mischief and the remedy, then we have these questions: The old law regulating and restraining the sale of liquors, was disjointed or fragmentary, because it was made up of separate statutes passed at intervals of years, not seldom presenting conflicting provisions, and often provisions in conflict with special local laws. At the same time, there was a settled conviction in the public mind that the license laws did not produce the revenue that ought to have been exacted for the privilege of selling liquor. In view of the in-

effectiveness of the old law, and the smallness of the revenue produced by it, the Brooks law was enacted. Its intention was to stop what, in the interests of good order, ought to be unlawful sales of liquors, and to exact a larger revenue from those sales made lawful by license. Probably, at the date of this act, club organizations, wherein liquor was furnished, as here, had been in existence in large towns and cities for fifty years. The Legislature was not ignorant of the fact. If such use tended to disorder or bad morals, the Legislature knew it. If such use was not of immoral tendency, yet was a luxury or privilege that would bear taxation and yield revenue, they knew that fact. Yet there are no words in the act which, by any possible construction, can be stretched into a prohibition of the use of liquor in clubs, or that can be deemed as requiring they shall be licensed. There is, in fact, no express legislation concerning this distinctive, open, notorious, long-existing use of liquor. The plain implication is that the consumption of liquor in clubs, as known to the Legislature, was not deemed a sale. The general words of the law, however, make the sale of liquor without license illegal everywhere in the Commonwealth; and whether this be a sale is now a judicial and not a legislative question.

The bill admits that the club will receive no profit on the liquors bought and consumed by the members, so that as concerns this usual incident of a sale, it is not present. The club buys the liquors and distributes them to the members. Those who drink them pay in proportion to the quantity drank. The money for the purchase of the liquor in quantities from the liquor dealer comes out of the treasury of the club. Nothing in the shape of food or drink is distributed equally to the members. There is an equal distribution of light and heat. Members have like access to the reading rooms and library, but when it comes to food and drink, each contributes to the common fund in proportion as he consumes. Some eat of terrapin and game, while others prefer less costly and plainer food. The member who is fond of terrapin contributes to the club the cost of it. It would be inequitable that the member who does not touch it, should share in paying for it by an equal contribution. The same rule is enforced in regard to liquors. Some do not touch them. They pay nothing. Those who drink them pay. The purpose of the whole system is to distribute the advantages, comforts and luxuries of the club among the members, so that there shall not be unequal contributions to the treasury which purchases them. They are all

owners of the property when purchased in equal shares, and, if a division were then made, each would be entitled to an equal share of the liquor; but one consumes his share and that of others who do not drink liquors, and he puts back into the common treasury the value of the others' shares. Therefore, although by consumption the division is not equal, yet it is made equal by the contribution to the treasury. That has neither lost nor gained. Consequently, the distribution is equitable. Does this constitute a sale? We think not. There is no element of bargain, only a method of distribution of the common property. We are aware that there is and has been much difference of opinion among courts on this question. In England the transaction has been held no sale: *Graff v. Evans*, 8 Q. B. Div. 373. In a recent case in Missouri (*State v. St. Louis Club*, 28 L. R. A. 578) the opinion contains a review of all the cases on the subject, and it is held to be no sale. In the still more recent case in New York Court of Appeals (*State v. Adelphi Club*, New York Law Journal, April 10, 1896, decided 7th of April last, and not yet officially reported in the books), all the judges concurred in pronouncing it no sale. The act then in force, and under which the indictment was framed and conviction had, prohibited the sale of spirituous liquors to be drank upon the premises. There was no question as to the fact that, under substantially the same club rules as here, spirituous liquors were distributed to the members, and by them drank upon the club premises, those drinking returning to the treasury the cost of the liquor. Black on Intoxicating Liquors (sec. 142), after citing the authorities from many States, comes to this conclusion: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person without discrimination can procure liquor by signing his name in a book, or buying a ticket or a chip, thus enabling the buyer to conduct an illicit traffic, then it falls within the terms of the law. But on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered

as within either the purpose or letter of the law."

As before noticed, there could have been no special intent on part of the Legislature to prohibit the act here complained of; there was a general intent to restrain the use of intoxicating liquors by prohibiting unlicensed sales thereof. If this were an unlicensed sale, under the guise of a club distribution, it would clearly be unlawful; the law would look through all disguises, and so pronounce it. But as on the undisputed facts, we are of the opinion the act apprehended by plaintiff is not a sale, there can be no violation of the law which will imperil his property rights.

It has been argued, that the effect of our decision, if against plaintiff, will be to deprive the licensed hotels of patronage to which they are impliedly entitled, by payment of heavy license fees under the Brooks law; that members of clubs will consume such liquors as they desire in their club rooms, instead of at licensed bars. This is not without force, but it should be addressed to the Legislature, who seem for fifty years, in all the legislation on the liquor question, to have carefully refrained from prohibiting the furnishing of liquor to club members by their clubs, as well as neglected to impose on them license fees. *The decree is affirmed.*

WILLIAMS, J., dissents.

Circuit Court, United States,

Western District of Pennsylvania.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. RICHARDSON, Adm'r.

On July 30, 1878, B. gave to a New York insurance company a mortgage on land in Washington county, Penna., to secure payment at the company's office in New York City of \$5500 with seven per centum interest, the then legal rate in the State of New York. On May 19, 1896, the administrator of B. instituted a proceeding in the Court of Common Pleas of said county of Washington, under the Pennsylvania Act of June 20, 1883, for the satisfaction of the mortgage; and after constructive notice to the insurance company by newspaper publication in said county, upon an *ex parte* hearing (the company not appearing), the court decreed satisfaction of the mortgage upon payment into court of the balance due as claimed by the petitioner, such balance being ascertained by computing interest at the yearly rate of six per centum. *Held,—*

- (1) That said Act of June 20, 1883, could not be construed as applicable to this mortgage, for to give it such retrospective effect would be to impair the obligation of the contract by changing the place of payment.
- (2) That the decree being beyond the power conferred by the act and not within the jurisdiction of the court was void and furnished no ground of defense to a *scire facias* on the mortgage from the Circuit Court of the United States.

No. 6 Nov. T., 1896. *Sci. fa. sur mortgage.*

Sur rule for judgment for want of a sufficient affidavit of defense.

Opinion by ACHESON, Cir. J. Filed November 9, 1896.

This suit is a *scire facias* by The Mutual Life Insurance Company of New York against S. C. Richardson, administrator of James Britton, deceased, with notice to The Carrie Furnace Company, *terre-tenant*, upon a mortgage from Britton to the plaintiff dated and given on July 30, 1878, on a tract of land in Washington county, Pennsylvania, to secure the payment by Britton to the insurance company at its office in the city of New York of a debt (evidenced by his bond of even date) of \$5500 on December 1, 1879, and also interest at the rate of seven *per centum per annum*, payable half-yearly on the first day of every June and December until the principal should be paid.

The plaintiff's affidavit of claim admits a credit of \$800 paid upon the principal of the debt and also the payment of interest up to June 1, 1896, at the stipulated rate of seven *per centum per annum*, which was the legal rate of interest in the State of New York at the date of the mortgage and accompanying bond.

The defendant sets up in bar of the suit a proceeding in the Court of Common Pleas of Washington county, Pennsylvania, under an Act of Assembly approved June 20, 1883, P. L. 138; 1 Purdon, 658, pl. 181, which provides as follows:

"In all cases where the legal holder or holders of a mortgage shall reside without the jurisdiction of this Commonwealth, or shall have removed therefrom without leaving a known duly authorized attorney to enter satisfaction on the record of such mortgage, on full payment of the principal and interest, and all proper legal charges being made, it shall and may be lawful for the owner or owners of the mortgaged premises, or any person interested, to apply by petition to the Court of Common Pleas of the county in which the mortgaged property is situated, setting forth the premises, and also the name and whereabouts, if known, of the holder or holders of said mortgage, if known, and if not known, then stating the facts, and that the principal of the mortgage-debt is overdue by expiration of the time therein limited, and not by reason of default in the payment of the interest; whereupon the said court shall make such order, for giving notice of said petition, and of the time of the hearing thereof to all persons interested, in such manner as the said court shall direct, either by personal service, or publication, or otherwise; at

the time therein specified, or at any subsequent time, on due proof being made of the truth of the said petition, the said court, upon payment being made into court of the said amount of the principal and interest, and all other moneys found to be due and owing on said mortgage, shall order and decree that the recorder of deeds of the proper county shall enter full satisfaction upon the margin of the record of such mortgage recorded in his office, which shall forever thereafter discharge, defeat and release the same, and shall likewise bar all actions brought or to be brought thereupon, as fully as if such payment had been made to the lawful owner or owners of such mortgage-debt, and as if such owner or owners had entered such satisfaction of record."

The proceeding in the Court of Common Pleas began by the petition of Richardson (the owners of the mortgaged premises joining in the prayer thereof), presented May 19, 1896, reciting the mortgage and setting forth that the balance due thereon did not exceed the sum of \$3347.47, that the owner of the mortgage, the insurance company, was without the jurisdiction of the Commonwealth and had no authorized attorney to enter satisfaction on the record of the mortgage upon the payment thereof, and praying that the insurance company be required to appear in court and show cause why the petitioner should not be permitted to pay the sum of \$3347.47 into court in full satisfaction of the mortgage, and that upon such payment into court, the court would order the recorder of the county to enter satisfaction of the mortgage upon the record. Upon the presentation of the petition the court fixed June 8, 1896, for hearing the same, and directed the prothonotary to give notice of the filing of the petition and of the day of hearing to the insurance company by publication for three weeks in one newspaper printed in said county, "a copy of the said newspaper containing the notice to be sent by mail to The Mutual Life Insurance Company of New York." On June 8, 1896, upon proof made of notice given agreeably to the previous order of the court (the insurance company not appearing), and after an *ex parte* hearing of the petitioner, the court made a decree that the amount due on the mortgage was \$3248.95, and directing that upon payment into court of that amount, "the recorder of deeds of the said county of Washington, Pennsylvania, shall enter full satisfaction upon the margin of the record of said mortgage recorded in his office in Mortgage Book No. 8, page 260, which satisfaction shall forever thereafter discharge, defeat and release said mortgage from said mortgaged premises, and shall likewise bar all actions brought or to be brought thereupon

as fully as if such payment had been made to the said The Mutual Life Insurance Company of New York and as if the said Mutual Life Insurance Company of New York had entered such satisfaction of record." Accordingly, upon the payment on June 8, 1896, of the sum of \$3248.95 into court, the recorder entered upon the margin of the record of the mortgage full satisfaction thereof.

The exemplification of this proceeding attached to the affidavit of defense as part thereof shows that in fixing the balance due on the mortgage at the sum of \$3248.95, interest was computed at the rate of six *per centum per annum* only instead of the contract rate of seven *per centum*. The exemplification also shows this remarkable fact, that after the filing of the petition and during its pendency, to wit, on June 1, 1896, the petitioner, or some one in his behalf, transmitted by draft to The Mutual Life Insurance Company at the city of New York the sum of \$171.50, being the half-yearly installment of interest at the contract rate falling due June 1, 1896, on \$4900, the balance of the principal of the mortgage-debt after crediting the \$600 which had been paid thereon. It may be assumed that the attention of the court was not called to this misleading act, which was so well calculated to lull into a false security the insurance company.

It is probable also that the court was not fully advised as to the terms of the bond and mortgage with respect to the place of payment and the rate of interest reserved. Certainly it is a well established rule that the rate of interest, in the absence of stipulation, is to be determined by the law of the place where the contract is to be performed, and that that rate may be expressly reserved though it exceed the rate allowed by the *lex loci contractus* or by the law of the forum: *Archer v. Dunn*, 2 W. & S. 327, 364; *Wood, Bacon & Co. v. Kelso*, 27 Pa. 241; *Fanning v. Consequa*, 17 Johns. 511; *Andrews v. Pond*, 13 Pet. 65, 77, 78; *Scotland County v. Hill*, 132 U. S. 107, 117.

It must be conceded, however, that if the Court of Common Pleas of Washington county had jurisdiction to make the decree set up in bar of our writ of *scire facias*, that decree cannot be impeached collaterally for mere error, and that it must be held conclusive here of the rights of the parties. Had the court lawful jurisdiction to make the decree?

Assuming that a proceeding under the Act of June 20, 1883, is in the nature of a proceeding *in rem* and that constructive notice by publication may bind a non-resident of the State whose whereabouts is not unknown, was such service

good in this instance where it was known and disclosed that the office of the insurance company was in the city of New York? The act, it will be perceived, contemplates two classes of cases, one where the residence of the absent holder of the mortgage is known and one where it is not known, and provides two modes of notice, personal notice and constructive notice by publication or otherwise. It is urged that the fair meaning of the act is that if the residence of the absent holder of the mortgage is known there must be personal notice. Such a construction of the act, it is claimed, does no violence to its language, promotes its true intent and subserves the ends of justice. The argument in favor of this view has much force, but my conclusion with respect to another jurisdictional objection renders it unnecessary for me to pass upon the sufficiency of the notice.

The mortgage, it is to be observed, was executed several years before the passage of the Act of June 20, 1883. Now by the terms of the mortgage and its accompanying bond the money thereby secured was made payable to The Mutual Life Insurance Company "at their office in the city of New York, on the joint receipt of their president and secretary, and not otherwise." This was the contract of the parties and they had a perfect right to make it. The provision as to payment was entirely reasonable and obligatory. The mortgagee did not undertake to keep an attorney in Pennsylvania to receive the money and enter satisfaction on the record of the mortgage upon payment. The insurance company was not bound to accept payment elsewhere than at its office in the city of New York. No valid tender of the money could be made elsewhere. The place of payment was a material part of the contract. No subsequent State law could impair the obligation of the contract in respect to the place of payment.

The invalidity of a State law impairing the obligation of a contract does not depend on the extent of the change which the law effects in the contract: *Green v. Biddle*, 8 Wheat. 1, 84. "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." *Planters' Bank v. Sharp*, 6 How. 301, 327. The obligation of a contract includes everything material within its scope, whether relating to the undertakings therein contained or to the means for the enforcement thereof: *Edwards v. Kearzey*, 96 U. S. 595;

McGahey v. Virginia, 135 Id. 662. A State statute authorizing a redemption of mortgaged property in two years after the sale under a decree, by *bona fide* creditors of the mortgagor, has been adjudged to be unconstitutional and void as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract: *Howard v. Bugbee*, 24 How. 461. .

It seems to me, then, that the Act of June 20, 1883, cannot be construed as covering the mortgage here sued on. To give it such a retrospective effect clearly would be to impair the obligation of the contract between these parties. It is to be noted that it was not alleged in the petition to the Court of Common Pleas of Washington county, nor is it pretended here, that a tender had been made to the insurance company at its office in the city of New York, or that a tender to the company was ever made anywhere. The position of the defendant is that, without compliance or attempted compliance by the mortgagor or those claiming the mortgaged premises under him with the terms and condition of the mortgage, by mere force of a subsequent State statute a change in the place of performance of the contract was effected, and that thereby the money became payable in the county of Washington, Pennsylvania, instead of at the stipulated place of payment in the city of New York. This was the exact result accomplished in and by the proceeding in the Court of Common Pleas of Washington county if that proceeding be sustained. But in my opinion it cannot be sustained. The act under which the court proceeded has no application to this mortgage. The decree of satisfaction then has no binding force because the court making it had no jurisdiction of the subject-matter. The decree being beyond the power conferred by the Act of June 20, 1883, and not within the jurisdiction of the court is void and furnishes no ground of defense to this suit: *United States v. Walker*, 109 U. S. 258.

The rule for judgment is made absolute.

For plaintiff, *J. W. Collins*.

For defendant, *Crumrine & Patterson*.

—The right of a bicycle rider to pass on the right-hand side in meeting a truck which is turning toward that side to the curb of the street is held, in *Peltier v. Bradley, D. & C. Co.* (Conn.) 32 L. R. A. 651, to be not absolute, and he is held not to have the right to assume that the driver must turn out for him, but is bound to exercise the same degree of care which is required of the driver in order to avoid a collision.

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PITTSBURGH, PA., DECEMBER 23, 1896.

Supreme Court, Penn'a.

BUCHANAN v. SUPREME CONCLAVE IMPROVED ORDER OF HEPTASOPHS.

Where a person holding a benefit certificate in a fraternal society becomes insane, and his daughter, to whom the certificate is payable on his death, requests the proper officer of said society to notify her of any assessments, non-payment of an assessment will not work a suspension of the certificate, in the absence of the requested notification.

Appeal of the Supreme Conclave Improved Order of Heptasophs, defendants, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action brought by Mabel L. Buchanan to recover on a benefit certificate.

The court below, SLAGLE, J., rendered the following opinion on refusing a motion for a new trial:

'This was an action upon a benefit certificate issued to D. H. Buchanan, and made payable to the plaintiff, his daughter. A verdict was rendered in favor of plaintiff. A motion for a new trial was made by defendant, for which a number of reasons have been assigned. We think there was sufficient evidence for submission to the jury of the questions of fact, and only two of the reasons assigned need to be considered. The fourth assignment is as follows: 'Witnesses for plaintiff having testified that D. H. Buchanan did not, to their knowledge, receive his copy of the *Advocate* in September, 1894, the court erred in charging the jury that mailing the said *Advocate* at Baltimore to the proper address of D. H. Buchanan was *prima facie* evidence that he received it, but that that evidence might be rebutted.' The court did not instruct the jury as stated. It was contended by plaintiff that the notice published in the *Advocate* was not the notice required by the constitution of the order; that it was a notice addressed to the conclaves, and should have been addressed to the members. The court held that the notice was sufficient in form. It was further contended that there was not sufficient evidence of mailing. The court submitted the question to the jury as follows: 'Now, was this placed in the post office, properly addressed to

Mr. Buchanan at the place of his residence, of which the order had notice upon their records? If so, then notice was given.' Counsel for plaintiff contended that they might show that it had not been received. It would probably have been better to have said that it was immaterial whether it had been received or not, the court having practically instructed the jury that there was no evidence to rebut the presumption that it had been received, and may have fallen into an error in saying 'However, if, under all the evidence in the case, you are not satisfied that this notice was not properly sent and received, the defendant has not made out a case of suspension.' But this certainly could have done no harm, as the case was submitted to the jury on the question which is the subject of the fifth assignment, as follows: 'The court erred in its charge to the jury in stating that Mabel Buchanan, the plaintiff, had an interest in the benefit certificate sued on, and that she was entitled to notice of the calling of assessments, for the non-payment of which D. H. Buchanan was suspended, if said D. H. Buchanan was mentally incapable of receiving or of understanding the meaning or effect of said notice, there being no provision in the law of the defendant entitling the plaintiff to any such notice in this case.' This is not in the language of the court, but is substantially correct. There was some evidence of the incapacity of Mr. Buchanan at and before the assessment of September, 1894, was made, and that it continued until his death. It was also in evidence that before the assessment was made Mabel Buchanan, the beneficiary, had written to the financial officer to whom all assessments were payable, referring to her father's condition, stating that he was careless, and liable to neglect them [the assessments]; that she had at various times paid them; and asking, 'If you find Mr. Buchanan won't pay them, please let me know, so that I can make an effort to do so.' In view of this evidence the court instructed the jury that Mabel Buchanan had an interest in that certificate. It is true that it is one that was subject to the voluntary control of her father. Therefore she had certain rights, and, if her father was insane, or incapable of attending to business, she had a right to keep this certificate alive; and, when she notified the proper officer, if she did, of her intention to keep it alive notwithstanding what her father might do, she had a right to do it. If he was capable of acting, no action of hers would keep it alive, because he had the power to destroy her rights at any time. But, if he was incapable of acting, she would have the right to say to this officer of this society, 'My

father is not capable of attending to this matter, and I will pay these assessments until he is.' The conclusion of the whole matter was stated as follows: 'Now, if her father was in such actual condition as to make him incapable of acting in this matter, she, as the beneficiary, had a right to pay the assessments, and when she asked to be informed of any assessments that were due I think it was the duty of the officers to notify her before any suspension was made; and, if they neglected to do it, then they could not work any suspension of this certificate.' This is the substantial testimony in the case. There is abundant authority for the position of the plaintiff's counsel that where the certificate of a beneficial association provides that a failure to pay any assessment within a certain time shall render it null and void, time is of the essence of the contract, and failure to pay within the time designated renders the certificate null and void; and that, where there is no provision of the contract which declares expressly or by necessary implication that sickness or insanity or similar incapacity shall excuse the payment of any assessment on the day it is due, the courts will not grant relief against such contingency. This is simply to hold that every one is bound by his contract deliberately made. However, the reasons for this seemingly hard rule are indicated in Bacon on Beneficial Societies, § 384, where he says neither insanity, sickness, nor absence is an excuse for non-payment of assessments, the payment being an act that can be performed by the member or by some other person. This marks the distinction between this case and those to which he finds the rule to have been applied. The statement of the text is possibly too broad, but certainly any one related to the member or interested in his estate may come to his relief under such circumstances, and especially when he is named as his beneficiary under his certificate. The beneficiary has an interest in the certificate, and, although it does not become absolute until the death, it is an actually existing interest until annulled under the rules of the order. So long as it remains in force, it belongs to him exclusively. Upon the death of a member it passes to the beneficiary as his own, and not as representative of a member.: *Hamill v. Supreme Council*, 152 Pa. 537.

If the plaintiff, having knowledge of the assessment, had offered to pay it to the proper officer, there can be no question but that he would be bound to accept it. When the offer was made in advance, good faith required that the beneficiary should have the opportunity to preserve her rights, not against the voluntary

act of the member, but against neglect caused by his inability to act. She was, therefore, entitled to notice upon proper request made. No notice was given, and it appears from the evidence that neither the plaintiff nor her mother had knowledge of the assessment; and, if plaintiff had actual knowledge of the assessment, it would be fatal to her claim. This gives pertinency to the testimony of the plaintiff and her mother that they did not see or know of the notice by publication. The only other question is as to the party to whom the request for notice was made. Plaintiff's request was sent to the financier of the local conclave. He is the only officer with whom individual members come in contact. To him all assessments are paid, and the order should be bound by his acts. The question in this case seems to be new. We think the law ought to be and is as given to the jury, and a new trial must therefore be refused."

For appellant, *J. A. Langfill* and *S. A. Will*.
Contra, *A. M. Robb* and *Young & Trent*.

PER CURIAM. Filed November 11, 1896.

We find no error in this record. For reasons given by the learned trial judge in his opinion refusing a new trial, the judgment should not be disturbed.

Judgment affirmed.

JACK v. KINTZ and BRUBAKER.

The Acts of 1887 and 1893, enlarging the capacity of married women to contract, and to acquire and dispose of property, do not affect the rule that where a married woman claims, as against her husband's creditors, property which was conveyed to her during coverture, she must prove that such property was purchased with her own means, or that it was a gift to her from her grantors.

A husband is a competent witness to prove that property conveyed to his wife during coverture was purchased with her own money.

Appeal of Elmer E. Kintz and Susan Brubaker, defendants, from the judgment of the Court of Common Pleas of Cumberland county, in an action of ejectment wherein William D. Jack was plaintiff.

On the trial of this cause, before STEWART, P. J., the following facts appeared:

Milton K. Brubaker was for a number of years the owner of a hotel property in New Cumberland. On January 4, 1888, he and his wife, Susan Brubaker, make a deed for the property to their married daughter, Mrs. Minnie M. Albright, for a consideration of \$8,500, \$2,000 of which was reserved and secured in the deed, to be paid to Mr. Brubaker in one year, with interest. There was no evidence that John R. Albright, the husband, ever owned or controlled, or had anything to do with the property,

or was interested in it, or participated in any way, directly or indirectly, in the sale. The deed was recorded on the day it was made. On March 24, 1888, Mrs. Albright and her husband made a deed for the property to Mrs. Susan Brubaker, the mother, for the same consideration of \$6,500, with the same reservation in the deed, providing for the payment of \$2,000 to Mr. Brubaker in one year, with interest. On March 2, 1888, one Annie K. Fleming obtained a judgment for \$7,889 against John R. Albright, on which execution was issued and the property in dispute levied on and sold at sheriff's sale on February 8, 1889, to S. M. Leidich for \$20. S. M. Leidich conveyed the property to Mrs. Catharine A. Fleming by deed dated December 20, 1889, which was never recorded. Mrs. Catharine A. Fleming made her will, dated February 17, 1890, and proved December 21, 1892, directing, *inter alia*, as follows:

"Item.—I give and bequeath unto my two children, Albert Fleming and Elmira Williams, and my grandson, John R. Albright, one dollar each.

"Item.—I give and bequeath the balance of my estate, real, personal and mixed, that I may have at the time of my death, unto my daughter, Annie K. Fleming."

Annie K. Fleming, the devisee, conveyed the property by deed, dated December 19, 1892, to W. D. Jack, the plaintiff. The plaintiff also offered in evidence judgments against John R. Albright, aggregating \$4,400, which were shown by the record to have been all paid and satisfied on or before April 1, 1888.

The defendant asked the court to charge—

1. The evidence in the case shows that the purchase of the property in dispute was made by Mrs. Albright on January 4, 1888, for \$6,500, \$4,500 of which was paid, and \$2,000 of which was reserved and secured by a lien fixed in the title, and there being no evidence that this was not her money, or that there was any fraud in the transaction, since the Acts of 1887 and 1893 it does not devolve upon her to show where she obtained the money, and the verdict should be for the defendants. *Refused.* (Second assignment of error).

The court declined to give binding instructions for the defendants. (Third assignment of error.) And affirmed the plaintiff's point that under all the evidence the verdict should be for the plaintiff. (First assignment of error.) The fifth assignment was the refusal by the court to admit in evidence the deed by Minnie M. Albright and husband to Susan Brubaker, dated March 24, 1888, and the sixth assignment was the refusal to admit John R. Albright as a competent witness because his wife claimed adversely to a party on the record whose title was derived through a deceased grantor.

Verdict for the plaintiff under instructions by the court, and judgment thereon. The defendants took this appeal.

For appellants, *F. E. Beltzhoover* and *G. Wilson Swartz*.

Contra, *W. F. Sadler* and *S. M. Leidich*.

Opinion by McCOLLUM, J. Filed October 5, 1896.

There are but two questions involved in this appeal. The first is whether a married woman who receives a conveyance of land is required in a contest with her husband's creditors respecting the possession and ownership of it to prove that she paid for it with her own money, or that it was a gift to her from her grantors. If she is required to do so her grantee in a like contest with the devisee of the vendee of the purchaser of it at a sale upon a judgment against her husband must make like proof. In the case before us the defendants claim to have a good title to the land in dispute by virtue of the deed of it from John R. Albright and Minnie M. Albright to Susan Brubaker, and the plaintiff claims to have a like title to it based on a judicial sale of it as the property of John R. Albright. It appears to be conceded that Milton K. Brubaker was the owner of the property on the 4th of January, 1888, and that he and his wife, Susan Brubaker, on that day made and delivered a deed of it to their married daughter, Minnie M. Albright, who on the 24th of March, 1888, united with her husband in a conveyance of it to her mother. The consideration named in each deed was \$6,500 and each was subject to the payment of \$2,000 of that sum to Milton K. Brubaker on or before the 15th of April, 1889. After the deed was made to Minnie M. Albright, and before the deed was made to Susan Brubaker, Annie K. Fleming obtained a judgment against John R. Albright for \$7,889, and on this judgment an execution was issued by virtue of which the land in dispute was seized and sold by the sheriff. If John R. Albright owned the land when the judgment was obtained, his title to it was divested by the sale and the plaintiff is the present owner of it. In other words the plaintiff had whatever right Albright acquired by the deed from the Brubakers to his wife.

It is a familiar and well settled principle that in a contest between a married woman and the creditors of her husband concerning the ownership of property which she claims to have purchased during coverture she must "prove distinctly that she paid for it with funds which were not furnished by her husband:" *Gamber v. Gamber*, 18 Pa. 363. This principle or rule

"applies to purchasers of real estate as well as personal." *Keeney v. Good*, 21 Pa. 349; *Walker v. Reamy*, 38 *Id.* 410; *Baringer v. Sliver*, 49 *Id.* 129. The rule thus established has been upheld in a long line of cases and distinctly recognized and enforced in the recent case of *Bollinger v. Gallagher et al.*, 170 Pa. 84. We cannot say therefore that the learned court below erred in holding that in the absence of evidence that the property was purchased by Minnie Albright with her own means the plaintiff was entitled to recover. We do not think that the rule we have considered is in any degree affected by the Act of June 3, 1887, or by the Act of 1893. These acts enlarge the capacity of a married woman to contract, and to acquire and dispose of property, but they do not remove the burden which rests on her of proving title to the property she claims against her husband's creditors.

The remaining question is whether the learned court below erred in rejecting the offer contained in the sixth specification. It was an offer to prove by John R. Albright that his wife, Minnie M. Albright, paid for the property with her own money. The only objection to it was that the person by whom it was proposed to prove it was not a competent witness. If there was any warrant for the objection it must be found in clause "e" of section 5 of the Act of April 23, 1887. We are unable to find anything in the record, in the evidence submitted, or in the offers of evidence made on the trial, which brings John R. Albright within any of the excluding clauses of section 5.

He is not a surviving or remaining party to the thing or contract in action, or to the suit, and he has no interest adverse to any right of the deceased party who was at most, according to the record, an intervening purchaser who devised the property to the plaintiff's vendor. The suggestion that if Minnie M. Albright was the owner of the property, her husband has an estate in the curtesy in it which he is interested in maintaining, overlooks the fact that whatever title he had in it has passed to her mother by the deed in which he joined.

We think that John R. Albright was a competent witness as to all relevant matters, and that the conclusion we have reached in respect to his competency is in accord with the decisions of this court, among which we may mention *Brown v. Carey*, 149 Pa. 134; *Dickson v. McGraw*, 151 *Id.* 98; *Gerz v. Weber*, *Id.* 396; *Smith v. Hay*, 152 *Id.* 377; *Tarr v. Robinson*, 158 *Id.* 64, and *Smith v. Rish*, 164 *Id.* 181.

We cannot say that, in the absence of evidence showing or tending to show the purchase of the property by Minnie M. Albright with her own

means, it was error to reject the offer of her deed to her mother. We sustain the sixth specification and overrule the first, second, third, fourth and fifth.

Judgment reversed and venire facias de novo awarded.

Superior Court, Penn'a.

KNIGHTS OF PYTHIAS BENEVOLENT ASSOCIATION OF COAL CENTRE, PENNA., v. LEADBETER et al.

On the second trial of a case it is shown that a witness, although within the jurisdiction of the court is unable to be present on account of sickness. *Held*, that the notes of his testimony, as given on the former trial are admissible.

Where a witness has explained fully a certain conversation, and on cross-examination is asked about her testimony in regard to the same conversation on a former trial, it is incompetent on rebuttal to ask the witness to explain the terms she used on the former trial.

Declarations of the burgess of a borough are not evidence against the borough unless they were made in the line of his official duty.

In the trial of the right to an easement claimed under adverse possession the judge in his charge says the adverse possession must be with the knowledge of the owner. But in other parts of the charge the rule is stated correctly, and it was admitted that the owner had notice of the adverse user. *Held*, that the appellant was not injured by the error and the assignment of error should be overruled.

Appeal of the Knights of Pythias Benevolent Association of Coal Centre, Pennsylvania, plaintiff, from the judgment of the Court of Common Pleas of Washington county, in an action of trespass brought against R. L. Leadbeter, Samuel Abercrombie and Elah Hicks, for obstructing plaintiff's user of the waters of a certain spring.

From 1836 to 1867 Col. Jehu Jackman owned a small tract of land situate on the hillside immediately above and adjoining the borough of Greenfield (now Coal Centre), Washington county, Penna., on which was located a spring. Thos. D. Piper at the same time owned a lot of ground in said borough fronting on Spring street some distance below said spring, on which was erected a dwelling house occupied at the time by himself and family and subsequently by other owners and their tenants. At some time between the years 1845 and 1850 he laid lead pipe from said spring, to his house and lot below, by means of which pipe water was conducted to his said property. On the Piper lot there was erected at the time the pipe was laid, a pump-stock or log about six feet in length with two longitudinal cavities of different dimensions extending nearly the entire length. This log

was set on end and the pipe leading from the spring entered the large cavity through the side of the log at a point near the ground. A short distance above where the pipe leading from the spring entered the log, was inserted a spigot used by the Pipers and their successors in title for drawing off water for house and family use. When the spigot was closed the water would rise in the larger cavity to a point near the top of the log, then pass over and down through the smaller cavity. Inserted into the log from below and connecting with the smaller cavity was another lead pipe laid about the same time or shortly afterward which carried the surplus or over-flow water from said Piper property to a public fountain or trough at the corner of Spring and Short streets some distance below. By divers *meane* conveyances the plaintiffs in this suit, the Knights of Phythias Benevolent Association of Coal Centre, Penna., became the owner in fee-simple of the said Piper lot, together with the appurtenances, and is still the owner thereof.

In July, 1894, the defendants, R. L. Leadbeter, Samuel Abercrombie and Elah Hicks, dug up a part of this pipe leading to the plaintiff's premises and disconnected it from said spring, changed its location and connected it with the public fountain below by a new and different route from that of the old pipe line, thus cutting off and destroying the water supply to the plaintiff's premises.

At the trial they attempted to justify their conduct on the ground that they were acting under directions of the officers of the borough of Coal Center.

In 1893, one J. B. Crothers became owner of the land on which the spring is situate, and in February, 1894, granted the borough the right to use the water from it. Defendants justified their conduct under this grant.

The plaintiff denied said alleged rights in Smith, Ashmead, Gregg and the borough and claimed the first right to use the water from said spring by reason of long continued, uninterrupted and adverse uses by itself and predecessors in title, to wit, for a period of 45 or 50 years.

The cause was twice tried in the court below. The first time the jury was unable to agree. The second time a verdict was rendered for the defendant and judgment was entered thereon.

For appellant, *O. S. Chalfant* and *T. Jeff. Duncan*.

Contra, *J. I. Brownson, Jr.*, and *Todd & Wiley*.

Opinion by RICE, P. J. Filed October 12, 1896.

Undoubtedly if the persons named made the agreement with Thomas Piper, specified in the

plaintiff's ninth point, the continued use by them, or the public as their successors, of the surplus water under said agreement could not mature into a right which would justify them in depriving the plaintiff, as Piper's successor, of its right to the first use of the water; but it would not follow as a necessary legal conclusion that the defendants were trespassers. This result could follow only if (1) Thomas Piper had acquired from the owner an irrevocable grant of the right to lead the water of the spring to his premises in the manner described in the testimony; or (2) the public or the borough acting for it were estopped to deny Piper's right, or (3) his successors had acquired the right by adverse user. It is not seriously claimed, and after a careful perusal of the testimony we do not think it could be safely asserted that there is any proof by direct evidence of an irrevocable grant by Jehu Jackman to Thomas Piper of the right to lead the water of the spring to his premises. There is evidence that he claimed to have received such a grant, and that this claim was accompanied by such use of the water as might raise the presumption of a grant, but that is as far as the testimony goes in that direction. Therefore his right and that of his successors in title arises, if at all, from adverse user. But whether they, either exclusively or in common with others, had acquired the right in that manner, as against the owner, was a question involving matters of fact which were necessarily submitted to the jury. The facts testified to by Mr. Shulterly had a very important bearing on that question, but they are not all the facts pertinent to the question, and we cannot say that they were conclusive.

It is suggested in the point that the persons named recognized Piper's right. But assuming this to be true, how would that estop the borough from enforcing its rights under its grant of February, 1894, from J. B. Crothers, the owner of the spring? This has not been made clear to us. So long as those persons and their successors took the surplus water under the agreement referred to, of course they could not acquire title by adverse user as against Thomas Piper. But they could terminate their use of the water under the agreement at any time. No such relation was established between them and Piper, and no such privity between them and the borough is shown as would preclude the latter from acquiring from the owner of the spring such rights as were still vested in him and asserting them against the plaintiff. In other words,—to adopt the language of the defendants' first point,—the borough having purchased from Crothers the use of the spring, it

was necessary for the plaintiff, in order to establish a right to the water of the spring as against the borough, to show that the plaintiff or its predecessors in title had acquired such right as against Crothers. In no view of the pleadings and the evidence would the court have been justified in affirming the plaintiff's ninth point.

Complaint is made not only of the refusal of the point but of the reason assigned by the learned judge therefor. Notwithstanding the very earnest argument of the appellant's counsel we are of the opinion that the court committed no error in saying: "The defendants do not claim title by adverse possession, they justify under the grant from Crothers of date February 17, 1894, and the fact that the plaintiff had no legal title to the use of the water, but only a revocable license." Referring to the record of the testimony we find that in opening their case in chief the defendants offered the grant of 1894 as the basis upon which they, as agents of the borough, acted. In their bill of particulars they averred (1) that the plaintiff and its predecessor in title never had the right to the water of the spring asserted in the statement of claims; (2) that certain citizens originally obtained permission from the owner of the spring to lay a pipe to conduct the water to a public fountain in the town, and in consideration of being permitted to cross Thomas Piper's land they permitted him to construct a cut-off so as to draw water from the pipe, which right to use the water was to continue only so long as the said pipe should be maintained; and (3) that in order to acquire the permanent right to the use of the water of the spring which had heretofore been enjoyed by license merely, the borough in 1894 purchased the same from the owner by the agreement in question. This falls very far short of averring a prescriptive right acquired by adverse enjoyment. On the contrary, a permissive use is alleged in terms which seem to negative the existence of a right in any one, prior to the agreement of 1894, to take the water of the spring against the consent of the owner. The issue thus raised was not simply whether the plaintiff or the borough had the superior prescriptive right—assuming that it must be in one or the other—but whether the user by the plaintiff and its predecessor in title was adverse, and had ripened into a prescriptive right prior to the date of the agreement. The facts alleged had a direct bearing on that question, and we cannot see that the defendants have shifted their ground in now arguing that this was the theory upon which they were alleged. It is certainly the theory of their first point, the affirmance of which has not been assigned for error.

The remaining portions of the answers, taken in connection with the general charge and the answers to the other points, could not possibly be construed by the jury as an instruction that the plaintiff had no legal title to the use. It is simply a statement of what the defendants asserted in that regard as part of their defense or justification, and it could not have been understood otherwise. The first assignment is overruled.

II. Proof having been made of the service of a *subpoena* on James Ward and of his inability to be present in court by reason of illness, it was not error to permit his testimony taken on a former trial of the case to be read: *Thornton v. Brittons*, 144 Pa. 128; *Com'th Title Co. v. Gray*, 150 Id. 255; *Perrin v. Wells*, 155 Id. 299. Therefore the second assignment of error could not be sustained, and, as we understood the appellant's counsel, it was abandoned on the argument.

III. Margaret Moore, a witness for the plaintiff, testified, in substance, that she had heard Thomas Piper say that "he got the right of way, got the privilege," from Jehu Jackman to fetch the water down to his milk house for his own use. She further explained that she understood the privilege or right of way thus acquired to be irrevocable—a privilege that nobody could take away from him. She further illustrated her meaning of the terms used by comparing the right to the right of way acquired by a railroad company. On a former trial of the case she testified simply that she had heard Piper say that "he got the water privilege from Col. Jackman to pipe it down to his property." The defendant put in evidence this extract from her testimony for the purpose of contradiction. The plaintiff in rebuttal proposed to ask her the effect of, and the sense in which she understood, the language of Piper, and the sense in which she used the word "privilege" in her former testimony. This was objected to and the rejection of the offer is the subject of the third assignment of error. Little more is needed to justify the ruling of the court than a bare statement of the question. The offer was not to prove that her answers on the former trial were not correctly reported, nor to prove that she did not understand the questions, nor to prove that she was not given full opportunity to answer or to explain, nor to prove that there was anything in the context to qualify or explain the extract from her testimony which the defendants had offered. It is difficult to see then how the rejected offer could have been rebuttal of anything. It was in effect but a repetition of what she had testified to on the present trial as to the meaning which she understood Piper to convey,

and as she was heard fully upon that subject in her testimony in chief, the plaintiff has no just cause of complaint.

IV. The question as to the notice posted at the watering trough was not of the highest importance, but even if it were, the rejection of the offer to prove in rebuttal the contents of the notice was perfectly proper. The plaintiff had given in its case in chief the substance of the notice. The testimony of the witness probably might have been objected to upon the ground that it was hearsay; but it was not objected to and was not contradicted. Indeed, the defendants called a witness (Thomas T. Lilley) whose testimony as to the contents of the notice was substantially the same as that adduced by the plaintiff. There was therefore no dispute as to what the notice was and any further testimony as to its contents would have been merely cumulative and in rebuttal of nothing that the defendants had shown, unless it was different from that which had been given already. This, however, was not alleged in the offer. So far as the testimony of R. L. Leadbeter as to the purpose or object of the borough in putting up the notice would be rebutted by evidence of its contents the plaintiff had the benefit of the uncontradicted evidence heretofore referred to. The fourth assignment is therefore overruled.

V. The fifth assignment of error is the refusal of the court to permit the plaintiff to prove the substance of a conversation between John Parshall, director or superintendent of the plaintiff association, and George S. Hornbake, burgess of the borough of Coal Centre, under which the defendants were acting, in which Hornbake is alleged to have stated that their intention was only to lay the pipe in the spring on a level with the pipe which carried the water to the plaintiff's property and that there was no dispute of the latter's right to use the water from the spring in common with the borough. It is to be observed that this was about the time that the new pipe line was being laid by the borough, but it is not asserted in the offer that the admission was made in the prosecution of the work in which the alleged trespass occurred. If the offered evidence was competent at all, it was because the burgess, as such, had authority to act, and hence to speak, for the borough in the matter. But the rights of the borough were defined by its contract, and the powers of the burgess were such only as the statute gave him. As burgess, Mr. Hornbake had no authority to surrender, or grant away, the borough's rights, and hence no authority to prejudice them by loose declarations not made in connection with any act complained of in the suit, or occurring

in the performance of an official duty. "The acts of the officers of municipal corporations in the line of their official duty, and within the scope of their authority are binding upon the body they represent; and declarations and admissions accompanying such acts as part of the *res gestæ* calculated to explain and unfold their character, and not narratives of past transactions are competent evidence against the corporation. To render such declarations and admissions evidence, they must accompany acts, which acts must be of a nature to bind the corporation:" 1 Dill. Mun. Corp. par. 237, note, p. 322, and cases there cited. According to this clear and accurate statement of the law, the evidence would not have been admissible for the purpose for which it was offered in a suit against the borough; *a fortiori* it was not admissible against these defendants.

VI. The excerpt from the charge specified in the sixth assignment is complained of because it seems to imply that in order to acquire a prescriptive right by adverse enjoyment it is necessary to show express notice to, and acquiescence of the owner. Standing by itself it might be subject to that criticism. It is to be observed, however, that there was no dispute as to the notoriety of the user or as to the knowledge of the owner. Indeed the defendant's contention was that it was permissive, by virtue of a revocable license from the owner. Thus his knowledge was a conceded fact, and it is fair to assume that the jury did not find against the plaintiff on the ground that the owner was ignorant of the user. In another portion of his charge the learned judge instructed the jury in this plain language: "Nor is there any dispute about the use of the water being a visible and notorious use. It was used in a way that could be fairly described as visible and notorious; it was not a secret use so that the owner of the spring would have no way of knowing that the water was being used, but it was used in such a way as fairly meets the requirements of the law; that is, it was visible and notorious." If there was any seeming error in the definition of adverse possession it was rendered harmless by this positive instruction. Furthermore, in affirming the plaintiff's third and eighth points, especially the latter, the jury were clearly and accurately instructed that the use of the water by the plaintiff and its predecessors in title when they saw fit, without asking the leave of the owner of the spring and without objection by said owner constituted an adverse use. "It is always unsafe, as well as unfair to the trial judge, to select a single sentence from the body of his charge, sever it from

the context and undertake to construe it by itself, without regard to what he may have said in the same connection, or in other portions of his charge:" STERRETT, C. J., in *Irvin v. Kutruff*, 152 Pa. 609, 612; *L. V. R. R. Co. v. Brandtmaier*, 113 Id. 610, 619; *Rogers v. Davidson*, 142 Id. 436; *Smith v. Meldron*, 107 Id. 348; *Malone v. R. R.*, 157 Id. 450, 441, 442. Read with the context and the answers to the points, the instruction complained of could not have misled the jury.

We have purposely confined our discussion of the case to the questions which are fairly raised by the assignments of error. As none of them can be sustained *The judgment is affirmed.*

U. S. Circuit Court of Appeals,

THIRD CIRCUIT.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. DOHERTY.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

[For syllabus and opinion of the court below, *ACHESON*, Cir. J., see 44 PITTSBURGH LEGAL JOURNAL, 65.]

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

Opinion by DALLAS, Cir. J. Filed December 1, 1896.

The question in this case is presented by the third specification of error, which avers that the court below erred in not sustaining an exception to the marshal's schedule of distribution of the fund in controversy, as follows:

"The marshal should not have distributed any portion of said fund to the plaintiff, because the plaintiff had no lien on said land by virtue of its said mortgage, and especially it had no lien upon said land as against the judgments of the exceptants, said mortgage being made and executed by George S. Doherty and so recorded, while the legal title to the land described therein and levied upon under such execution was at the time in George Doherty, as appears by the records of the Recorder's office in Allegheny county, in Deed Book, vol. 825, p. 597, the judgments of said exceptants being against George Doherty, in whose name the legal title stood."

The facts are, in part, thus stated in the opinion of the court below:

"On the 7th day of October, 1895, the defendant, George S. Doherty, executed and delivered to the plaintiff, The Mutual Life Insurance Company of New York, his mortgage upon a lot of land situate in Allegheny City, Allegheny county, Pa., to secure a debt of \$10,000. The

mortgage is in the defendant's proper name, George S. Doherty, and is so signed and acknowledged. It was recorded in the Recorder's office of Allegheny county on the 15th day of October, 1895. On May 21, 1896, suit by *scire facias* upon the mortgage was brought in this court, and on June 8, 1896, a judgment therein for the sum of \$10,878 was entered in favor of the plaintiff. A writ of *levari facias* was issued upon the judgment and by virtue thereof the marshal sold the mortgaged premises. In and by his special return the marshal appropriated out of the proceeds of sale to the plaintiff in the writ, The Mutual Life Insurance Company, the amount of the judgment on the mortgage and interest."

The appellants insist that the "proper" name of the mortgagor is George Doherty, and not (as in the above extract) George S. Doherty; but whether, for every purpose, the one name or the other should be regarded as the true one, is unimportant. We think the learned judge was right about it, but do not rest our judgment upon any such abstraction, but upon the fact, which for the present purpose is controlling, that George Doherty, who took and held the legal title, and George S. Doherty, who made the mortgage, was one and the same person, and was known to be so by the appellants when they obtained the instruments on which the judgments were entered under which they claim priority of lien. The facts are undisputed, and the necessary deduction from them is, that the appellants, well knowing that the actual owner of the land had, by the name of George S. Doherty, executed a mortgage, which was recorded in the time, undertook to defeat or postpone it by entering confessed judgments against the same person under the name of George Doherty. They had previously taken, for the same debts, judgments D. S. B. against him as George S. Doherty. It is manifest, therefore, that they, themselves, understood that to be his name, and were aware that the person so named was the owner of the property to whom the title had been conveyed by the name of George Doherty. Under such circumstances, the demand that these judgments should be preferred to the prior mortgage, by reason merely of the alleged more correct designation of the debtor in the former, is as devoid of legal support as it is of intrinsic merit.

The opinion filed in the Circuit Court adequately discusses the case, and we concur in the conclusion which was there reached. Its decree is therefore affirmed.

For appellant, *Alex. Gillman* and *J. H. Beal*
Contra, *James W. Collins*.

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No. 23.

PITTSBURGH, PA., DECEMBER 30, 1896.

Court of Common Pleas No. 1.

GREGG, for use, v. KREBS et al.

A. leased to B., rent payable monthly, and in default for five days B. authorized the confession of judgment in ejectment. *Held*, that B. has five full days after the writ is due in which to pay, and the last day of the five days being Sunday he has all day Monday, and judgment in ejectment cannot be entered until Tuesday.

No. 13 Dec. T., 1896.

David Gregg leased to Otto Krebs the premises situate at No. 6 Sixth avenue, in the city of Pittsburgh, for and during the term of twenty years, from the first day of April, 1879, at an annual rental of \$1200, payable monthly, "which rent, so reserved, the said lessee agrees to pay regularly as it may fall due, or *within five days thereafter*," in default of which the lessor might "without notice re-enter and take possession of the premises;" and containing an amicable confession of judgment in ejectment for the purpose of forfeiting the lease. David Gregg died April 2, 1892, having devised the said premises to certain of his grandchildren who bring this suit. The present controversy arose over the rent for August, 1896. The first day of September, 1896, came on Tuesday, and the "five days thereafter," within which time the rent was payable, expired on September 6th. The 6th happened on Sunday, and on Monday, September 7th, Otto Krebs tendered the rent, which was refused as being too late, and the lease declared forfeited, and the declaration in ejectment filed in this court on the same day.

For plaintiff, *A. M. Imbrie*.For defendant, *Charles W. Dahlinger*.

Opinion by STOWE, P. J. Filed December 3, 1896.

The lease from David Gregg to Otto Krebs let to the latter the premises involved in the case "for the term of twenty-one years from the first day of April, 1879, to the first day of April, 1899, at the rate of twelve hundred dollars per annum, payable monthly." Under its terms the rent was payable only at the termination of each month, to wit, on the first day of each

succeeding month. In *Marys v. Anderson*, 24 Pa. 275, KNOX, J., says: "The lease was from the 1st April, 1848, for one year. The tenant took possession on the 1st April, 1848, and at the close of 31st March he had occupied the premises for an entire year. The first day of April, 1849, was the commencement of a new year, and on the morning of the 1st April, at any time after 12 o'clock of the preceding night, the rent was due and payable." So in this case, the rent being payable monthly, was not due till the first day of each month, and as that day in this instance was on Tuesday, and defendant had the privilege to pay within five days, it was not till *five days thereafter* had expired that judgment in ejectment could be entered under the provisions of the lease for default of payment. The fifth day falling on Sunday defendant had the whole of Monday, as he would have had the whole day of Sunday, had it been a secular day, to pay the rent for the preceding month, and as the judgment was entered on the 7th (Monday) it should be set aside.

We cannot, however, discover that plaintiff has waived his right to proceed, at the time fixed, for it would it seem, in all cases except two, the rent had been paid before the five days of grace had expired. One of those was on the 7th and the other on the 9th, and so far as appears may have for special reasons not calculated to throw plaintiff off his guard. It was evidently understood by defendant that he was to pay within the five days, and the evidence does not show anything that would justify him in supposing otherwise.

The rule to open the judgment in this case must be made absolute.

Court of Common Pleas No. 2.

THE GERMAN SAVINGS & DEPOSIT BANK v.
THE BRADDOCK UNION PLANING MILL
COMPANY, Garnishee of T. J. CARBOY.

Where answer to interrogatories in an attachment execution have been filed by the garnishee and a plea entered and case put at issue, money that afterwards comes into his hands is not bound by the attachment. After plea filed and case is at issue the plaintiff cannot file interrogatories and require additional answers.

No. 71 July T., 1895. Execution attachment.

Petition of plaintiff and rule on garnishee to answer additional interrogatories, and answer thereto.

Opinion by EWING, P. J. Filed December 22, 1896.

The plaintiff having obtained judgment

against T. J. Carboy, issued an execution attachment thereon on the 11th April, 1895, which was served on the garnishee the same day. On May 8th interrogatories and rule to answer were served on the garnishee; and on the 16th of May the interrogatories were fully answered.

On July 25, 1895, plaintiff's counsel called on counsel for garnishee with a plea of *nulla bona* prepared, and requested the plea to be signed. It was signed by counsel for garnishee. Plaintiff's counsel then filed this plea with the prothonotary with a *precept* to place the case on the issue docket where it was accordingly placed, and in due course it was put on the trial list and was awaiting trial on 23d September, 1896, when plaintiff's counsel filed a petition setting forth that he "had been informed within two days that *since the plea pleaded in this cause assets amounting to about \$1200 belonging to said defendant have come into the hands of the garnishee, and prays that the garnishee may be required to make answers to a series of interrogatories in relation thereto.*"

To this rule the remaining partners of the garnishee firm make answer that *since their plea was filed and issue formed* they had dealings with Carboy to an amount approximating eleven or twelve hundred dollars (more than plaintiff's judgment), beginning 16th December, 1895, and ending 17th June, 1896, and that resting on the belief that the force of the writ of attachment in the case ceased on issue formed, as stated, they paid from time to time the aggregate of about \$1200 to Carboy, paying him in full at the end of the dealings; and also setting up other alleged equitable reasons why they should not be required to answer further.

These facts raise squarely the question as to whether or not the execution attachment binds the effects of defendant coming into the hands of the garnishee up to final judgment, notwithstanding the full answers to interrogatories and plea pleaded substantially on a rule to plead, and the case at issue and awaiting trial for a long time before.

There is no question that *before an issue is formed* the writ binds the assets coming into garnishee's hands: *Silverwood v. Bell*, 8 Watts, 420.

The execution attachment is based on the Act of 16th June, 1836, sec. 35, *Purd. Dig.*, p. 835, to wit: "In the case of a debt due the defendant or of a deposit of money made by him or of goods or chattels pawned, pledged or demised as aforesaid, the same may be attached and levied in satisfaction of the judgment in the manner allowed in the case of a foreign attachment." * * *

Turning to the Foreign Attachment Act of 18th June, 1836, *Purd. Dig.*, p. 933, after providing for the manner of taking judgment against the defendant, the 55th section of the act provides that, "After judgment as aforesaid, it shall also be lawful for plaintiff to exhibit in writing to every garnishee as aforesaid, all such interrogatories as he may deem necessary touching the estate and effects of the defendant in his possession or charge, or due or owing from him to the defendant at the time of the service of such writ or at any other time, and cause the same to be filed of record in the cause."

The 56th section provides for answers by the garnishee.

The 58th section provides that "If issue be taken and a trial be had * * the jury shall find what goods or effects, if any, were in the hands of the garnishee at the time the attachment was executed, or afterward, and the value thereof."

No decision of the Supreme Court has been cited to us squarely ruling the question in this case, nor have we found such decision.

Counsel for plaintiff cite us the cases of *Mullen v. Maguire*, 1 W. N. C. 577, and the case of *Excelsior Brick Company v. Haines*, 21 *Id.* 32, in support of their contention, and in each of the cases the law is so declared.

In each of the cases the decision could have been made on other grounds. In *Brick Company v. Haines* the garnishee put in his plea within three days after service and before the return of the writ, and before interrogatories had been filed.

In *Benners v. Buckingham*, 1 Phila. 68 (Judge HARE) says: "It is undoubtedly true that what comes to hands of the garnishee after *nulla bona* pleaded cannot be given in evidence at the trial of the issue. This comes from the rule of pleading which refers every plea to the time when it is made and tests its truth by the facts then existing."

Plaintiff's counsel claims that the words of the statute, *at the time of the service of such writ or at any other time*, are to be construed literally without any regard to previous customs or rules of pleadings and practice, and such is the line of argument in *Mullen v. Maguire* and *Brick Company v. Haines*. This is not the true rule of construction.

The attachment laws of Pennsylvania are devised from the customs of London, and this custom may be considered our common law of attachment: *Ratgnel v. McConnell*, 25 Pa. 363; *Longwell v. Hartwell*, 164 *Id.* 537.

By the custom of London "the defendant's property must be found to have come to the hands of the garnishee before plea pleaded, and

can the plaintiff give in evidence at the trial any moneys that came to the garnishee's hands after plea pleaded?" Sergeant on Attachment, p. 110.

This was certainly the practice in Pennsylvania at the time of the passage of the Act of 1836 and long thereafter. On inquiry of members of this bar likely to know and some of them associated with practitioners who antedated 1836 and continued in practice many years thereafter, find the rule and practice to have been in this county, that until plea pleaded the garnishee was liable for all of defendant's property that came to his hands before plea pleaded, but not thereafter. This is probably the first case in the courts of this county in which the rule has been questioned.

In *Baignel v. McConnell*, *supra* (1855), LEWIS, C. J., says: "Our proceedings in foreign attachment are founded on the custom of London;" and in another part of the opinion, he says, "*The rule in foreign attachment is that garnishee is not liable for goods which come to his hands after plea pleaded.*" While this was not the point in the case and the statement of the rule is but in illustration of other matters, it shows clearly what the opinion of the Supreme Court was at that time.

In foreign attachment, the plaintiff must obtain judgment against the defendant before he can issue a *scire facias* against the garnishee, then he can file interrogatories and rule the garnishee to plead.

The words in the act, "At the time of service of such writ and at any other time," are fairly and properly interpreted by referring the words "at any other time" as meaning at any time until plea pleaded. Correct and well established rules and principles of pleading requires such an interpretation. On principle it is as fairly limited to the time of plea pleaded in a proper and regular way as to time of verdict, or even of judgment.

The amicable request for a plea in this case was in accordance with the ordinary practice in our courts, and is for the purposes of this case equivalent to a plea put in answer to a formal rule to plead.

Under what rule of pleading could the garnishee be required to put in additional pleas?

We see no good reason in statute or authority or principle for sustaining the contention of plaintiff.

And now, 22d December, 1896, after argument and upon consideration, the rule on garnishee in this case is discharged.

NOTE TO FOREGOING OPINION.

On argument of this case the plea and order

for issue docket had been mislaid and the statement in relation thereto was taken from the statement of plaintiff's counsel, agreed to by defendant's counsel.

Since the foregoing opinion was written the plea and order have been found.

On inspection, the plea, except as to the amount admitted and answer filed, is "*nil debit*," and not "*nulla bona*" as stated. This, however, makes no difference in the conclusion. "The plea of *nil debit* is a good and proper plea, where, as in this case, money is attached: Sergeant on Attachment, p. 99. It was the plea prepared and asked for by plaintiff's counsel on which he put the case at issue and ordered it down for trial.

For plaintiff, *W. H. Lemon*.

For garnishee, *Francis S. Bennett*.

Court of Common Pleas, LAWRENCE COUNTY.

KARNES v. ROSENA FURNACE CO. et al.

Plaintiff obtained judgment against the defendant for board, and issued execution attachment upon which judgment was obtained against the garnishee who answered that he owed the defendant a certain amount for wages. *Held*, that under the Acts of May 6, 1870, and April 4, 1889, relating to attachments, the defendant could not claim the benefit of the exemption law.

No. 33 Dec. T., 1895. Attachment execution of wages for four weeks' board.

Opinion by TAYLOR, J., 27th Judicial District, specially presiding. Filed August 22, 1896.

The plaintiff in this case, Ellen Karnes, on June 25, 1895, made affidavit before the alderman that the defendant, Martin McGuire, was "justly indebted to her in the sum of \$18 for boarding furnished defendant over and above all discounts," upon which "attachment and summons" issued to defendant. On July 3, 1895, the day of appearance, the case was continued, the defendant having been legally served, until July 10, 1895, at 9 o'clock A. M., at which time both the plaintiff and defendant appeared before the alderman, in person and by counsel, with their witnesses, which were sworn, and the case "proceeded to trial," and, "after hearing the parties, their proofs and allegations, judgment reserved." On July 19, 1895, judgment was entered publicly against the defendant, Martin McGuire, and in favor of the plaintiff, Ellen Karnes, for \$26.50 and \$4.20 costs, upon which execution was issued and returned by the constable "no goods."

On October 2, 1895, attachment in execution

issued on judgment obtained before said alderman on July 10, 1895, and plaintiff filed interrogatories and entered a rule on garnishees to answer in eight days. October 2, 1895, returned, on oath, that attachment served on defendant and garnishees personally and by copy. Garnishees made answer that they are indebted to the defendant in the sum of \$25.35 for wages. Defendant does not appear, but plaintiff, on October 9, 1895, in person and by counsel, appears and "claim to have execution of her judgment for \$18, being for four weeks' boarding, on effects of defendant in hands of garnishees; whereupon judgment that the plaintiff have execution of the said debt of \$25.35, due by garnishees and attached in their hands for four weeks' boarding, the sum of \$18." * * * October 9, 1895, the defendant appeared, by his attorney, and claimed the benefit of the \$300 exemption law. Attached to the record sent up are leaves from what appears to be the plaintiff's book of original entries, showing that she was engaged in boarding the defendant for a time and keeping a book of accounts in which there were charges for boarding and credits of payments on account of such boarding. McGuire, the defendant, then finding his wages fastened upon by the plaintiff, for boarding, not exceeding the amount of four weeks, took the writ of *certiorari* on October 12, 1895, bringing into the Common Pleas the record of the alderman, to which he filed, on December 11, 1895, the following assignments of error: 1. The justice had no jurisdiction to enter the judgment of October 9, 1895, against the garnishees. 2. The judgment of October 9 is illegal, erroneous and unauthorized. 3. The justice erred in entering the judgment of October 9, 1895, after the defendant had claimed the benefit of the \$300 exemption law. 4. The justice erred in not allowing defendant's claim for exemption. 5. The judgment of July 19, 1895, in favor of Ellen Karnes against Martin McGuire, being for more than four weeks' board due and owing the plaintiff, could not be made the basis of the attachment execution in this case. 6. The claim of the plaintiff, Ellen Karnes, as shown by the justice's record, does not show it was for four weeks' board. The judgment of July 19, 1895, not being for four weeks' board, the wages of defendant could not be legally attached thereon. And additional assignment of error filed with the court at date of reargument, August 22, 1896, as follows: The record of the justice does not show that the attaching creditor was a proprietor of a hotel, inn, boarding-house or lodging-house in this Commonwealth.

It will be necessary to review the prior acts

on the subject of attachment execution in order to understand the force and effect of the Acts of May 8, 1876, P. L. 139, and April 4, 1889, P. L. 23, which confer jurisdiction in this case.

Prior to 1836, the plaintiff in a judgment had no means of reaching that large class of property known as choses in action, and the Legislature, to remedy this, passed the Act of 1836, which provided for a new writ of execution to be called an attachment execution. This act seems not to have given any jurisdiction to justices of the peace, and in 1845 the Legislature passed the act of that year, wherein justices and aldermen were given jurisdiction in the classes of debts provided for in the 32d to 38th sections of the general law of 1836, but expressly exempting from the operation of the act wages of laborers. Under this act every species of property enumerated in the sections of the Act of 1836 named were, in the 1st section of the Act of 1845, liable to attachment execution, except wages of laborers alone. Under the principle that a man owes no higher duty than to pay for the food he eats, and that any law that allows him to escape this obligation was unjust, the Legislature again interfered and passed the Act of 1876, which made wages liable to execution attachment where the claim was for board. It was undoubtedly the purpose of this act to compel a man to pay his board bill, and if he was so lost to all sense of justice as to refuse, to take away from him every benefit which the policy of the State had seen fit to protect the poor but unfortunate debtor with, but, by an unfortunate wording of the act, the Legislature failed to effect this laudable purpose, and the case of *Smith v. McGinty*, 101 Pa. 402, practically made the act nugatory by holding that the laborer who had money and yet would not pay his board bill was still entitled to the benefit of the exemption law. A decision of the Supreme Court, which in effect struck from the statute books an act of this nature, called for remedial legislation. To live, it is necessary to eat, and when a man has eaten, any law that allows him to escape payment of an obligation thus incurred was at once inequitable and unjust, and the Legislature was not slow to respond by an act, the purpose of which was to call into full force and effect the prior Act of 1876.

That the Acts of 1876 and 1889 are to be read together cannot for a moment be doubted. The learned authors of both our digests have so considered them, the decisions of every one of our Common Pleas Courts have so construed them, and the only time that the Supreme Court has passed on the question, they have in clear and unmistakable language so declared them.

In the case of *Weisman v. Weisman*, 133 Pa. 89, the first exception was, "the justice erred in refusing to allow the defendants the benefit of the exemption law," and the court expressly held that, under the Act of 1889, the claim for exemption could not be allowed. All the Acts of Assembly speak of the judgment upon the attachment. The Act of 1836 almost in every section uses the word "judgment," and in every case clearly refers to the judgment upon the attachment execution. It is the same with the Act of 1849. The Act of 1876 gives the right to attach for four weeks' boarding or less. The only object contemplated in all the acts is the attachment execution. No legislation was intended as regards the judgment upon which the execution was to issue. The Act of 1876 provides that an attachment execution may issue for four weeks' board, and not that an attachment may issue when the original judgment is for four weeks' board; and to make this clear, it provides that the amount attached "shall not be paid to the defendant until the judgment so had for such amount as may be due upon said attachment shall be satisfied." Here the word "judgment" clearly refers to the judgment upon the attachment. The Legislature, when they found this latter clause ineffectual for the object desired, added another proviso by the Act of 1889, and the word "judgment" in that act has precisely the same meaning as the word "judgment" in the Act of 1876, and in all the other acts in regard to attachment execution, and that is to the judgment upon the attachment.

As to the question of jurisdiction raised in the case by reason of it not appearing by the record that the plaintiff was a keeper of a boarding-house, there is no merit in it. It was not touched on in the original argument, and is directly precluded by the rule of court, section 8, page 32, which provides that "the plaintiff in error shall, within ten days after the return-day, assign specifically the error upon which he relies." And it is further a well-settled rule of practice that the court will not notice an error that is not the subject of an exemption with the rule. An examination of the so called exception shows that it has never been filed, and has been placed with the papers since the prior argument. That a general exception to the jurisdiction should open the flood-gates to every conceivable jurisdictional question that could arise in the hearings before a magistrate is certainly unfair to the other side and clearly contrary to the rule of court. While the general rule is that want of jurisdiction may be taken advantage of at any stage of the proceedings, yet this only applies to questions affecting the

subject-matter of the suit, or when the parties have not been properly summoned and are not legally before the court.

"When the court has jurisdiction of the subject-matter, and is only restricted from entering the individual case by some circumstance peculiar to itself, the objection to the jurisdiction may be waived:" *Fennel v. Guffey*, 155 Pa. 88. And in this case the court held that the question of jurisdiction could not be raised after plea filed. The court, in laying down the same principle in the case of *Putney v. Collins*, 3 Grant, 72, says: "In this case the defendant's objection was that the cause of action was local; that the tort complained of had been committed in Armstrong county and not in Clarion, and that the action could only be maintained in Armstrong county. This was only an objection to the power of the court to try the particular case and not to its power to try cases of the same general character." But, aside from any technical objection that may be raised to this exception to the jurisdiction, it has no merits. The clear and unambiguous language set out in the record is that the attachment was issued for board. "Whatever the record tends to show as having been done below must be taken as proved in support of the judgment:" *Harris on Certiorari*, § 82.

And it is laid down as a general rule in the same authority that if the court, upon review of the record, should be of the opinion that part of the proceedings are regular and good, and part of them irregular and bad, the court has the discretion to quash the proceedings in part, affirming what is regular, if they are independent parts of the proceeding.

In *Weisman v. Weisman*, 133 Pa. 89, the court says that there is always a fair presumption in favor of the correctness of the record and proceedings before the justice. There is no rule of law that requires a person to keep one or a dozen boarders before they may become a boarding-house keeper. The record shows conclusively that the defendant was a boarder with the plaintiff. The Act of 1849 only exempts the wages of laborers, and if the defendant's rule of construction is correct, the defendant would not only have to show that it was wages that has been attached, but also that he is a laborer. It does not appear any place in the record of the case that the defendant is a laborer; therefore he cannot claim the exemption of the Act of 1849. If we can assume that money due a man as wages sufficiently sets out the fact that he is a laborer, we can certainly assume that money due a man as boarding sufficiently sets out the fact that he is a boarding-house keeper.

All the acts in reference to the exemption or attachment of wages use the words "wages of laborers;" yet it has universally been held that when the fact appears that the money was due as wages, it would be presumed that it was the wages of a laborer.

The case of *McCort v. Brenaman*, cited by the defendant, in 1 Dist. Reps. 782; 11 C. C. 645, is entirely different from this case. As an examination of the record shows that neither the original judgment or that the attachment execution was for board, no jurisdictional facts are shown that would entitle the plaintiff to issue the attachment.

Neither can we agree with the defendant in his position that the word "property," in the Act of 1889, does not include wages. The courts have construed it to include wages, as will appear by reference to the cases of *Weisman v. Weisman*, 133 Pa. 89; *McCarty v. Daugherty*, 16 C. C. 86; *Thomas v. Glasgow*, 13 Id. 167.

Upon an examination of the cases cited by the defendant, it will be found that they do not support this position. The Act of March 4, 1889, says: "No exemption of property from attachment." The word "attachment" clearly means attachment execution; therefore the word property must mean such property as can be reached by attachment execution, or that class of property known as choses in action. That wages are choses in action cannot be doubted. When the word "property" is used in connection with the ordinary execution, it might be conceded that it did not include wages. Wages being a chose in action, was property that could not be reached by execution, and, prior to the Act of 1836, choses in action could not be reached in any way or by any writ known to the law.

As was said in the argument of the case, it is not often that the Supreme Court passed upon the question of *certiorari* to justices of the peace, and the rule laid down in *Weisman v. Weisman*, is undoubtedly the rule that should, in our opinion, control the actions of the Common Pleas in such cases; and, as was well said in that case by all the court, "to hold them to the strictest accuracy in every little detail would greatly impair the usefulness of this large class of magistrates." Whatever has been the strictness of the rule applied by the Common Pleas judges in the past, in our judgment, it should undoubtedly be modified to meet the more equitable ruling of the Supreme Court in the above case, with which, in all the facts and circumstances, this case is so nearly in line that it seems almost impossible to distinguish between them; and we know of no more fitting words to dismiss this proceeding and affirm the proceed-

ings before the alderman than the language of the Supreme Court in that case: "It would have been wise for the appellant to have paid his four weeks' board than to waste his money in this frivolous litigation."

And now, September 4, 1896, this cause came on to be heard, on reargument ordered, before me, specially presiding in the Common Pleas of the 53d district, and in open court, on August 22, 1896, was argued by counsel, and, after due consideration thereof, the proceedings had in said case before the alderman are hereby affirmed and the writ of *certiorari* issued at instance of defendant quashed, at costs of defendant, Martin McGuire.

For plaintiff, *E. M. Underwood*.

For defendants, *Winternitz & McConahy*.

Court of Quarter Sessions.

In re Annexation of a Portion of the TOWNSHIP OF BRADDOCK to the BOROUGH OF EAST PITTSBURGH.

In the annexation of part of a township to a borough, under the Acts of 1851 and 1871, no one but a citizen of the part annexed can appeal. A school district cannot appeal as such, nor can the supervisors of the township.

No. 59 Sept. Sess., 1896.

Opinion by SLAGLE, J. Filed November 28, 1896.

The proceedings in this case are under the 30th section of the Act of April 3, 1851, relating to boroughs, and the 4th section of the Act of June 2, 1871, *Purd. Dig.* 232, pl. 17 and 18. A copy of the ordinance was filed in the office of the clerk of this court on October 17, 1896. On the 14th of November, 1896, three appeals were filed:—

First.—By F. W. Edwards and other citizens of Braddock township which does not state that the appellants are citizens of the district annexed, and by the supervisors.

Second.—By the school district of Braddock township and George B. Whitfield, a member of the board of directors, and a citizen of the district annexed.

Third.—By citizens of the district annexed.

The borough of East Pittsburgh moves to strike off the first and second appeals.

In such a case there is no appeal except such as may be given by statute. By reference to the statute it is clear that the right of appeal is limited to "citizens of the borough or of the territory annexed."

The school district as such is not a citizen of

the district annexed, nor are the supervisors of the township. Though George B. Whitfield is not entitled to an appeal as a school director, he is a citizen of the school district annexed, and though he is represented to be a school director, he has signed the first appeal as an individual. He has the right of appeal and we cannot dismiss his appeal because others have joined with him who have no such right; all we can do is to strike off as appellants those who have no right to appeal; that is the school district of Braddock township.

The second mentioned appeal is totally defective in that the supervisors have no right to appeal, and it does not appear that the other appellants are citizens of the territory annexed.

George B. Whitfield's name appears on all the appeals. We do not see that this vitiates any of them. If it is improper that he should appear in more than one it can be remedied by withdrawing his name from one of them. It does not appear which paper was first filed, and if the court thought it necessary to strike out his name from any one or more they could not do so intelligently.

We will therefore now make an order striking out the name of the school district of Braddock township in the first, and striking out the appeal of the supervisors and others uniting with them.

A proper order may be drawn by counsel.

For appellants, *William Yost*.

For borough, *V. A. Powell and Dalsell, Scott & Gordon*.

Circuit Court, United States,

Western District of Pennsylvania.

**FOX SOLID PRESSED STEEL COMPANY v.
CHARLES T. SCHOEN AND THE SCHOEN
MANUFACTURING COMPANY.**

A contract between the F. Company and S., the main purpose of which was to regulate between the parties the manufacture of centre plates for car trucks, contained this clause: "It is further agreed that the parties of the second part will not engage during the life of this agreement in the manufacture of truck frames for moving vehicles or any part of such frames when made of pressed metal." At the date of the contract and thereafter the F. Company was engaged in the manufacture of pressed metal truck frames exclusively and S. was engaged in the manufacture of pressed metal parts of diamond truck frames, and with the knowledge of the F. Company and without objection continued such manufacture for several years. *Held*,—

(1) That having regard to the whole contract, the circumstances under which it was made, the relations of the parties, their connection with the subject-matter of the contract and their practical construction thereof, the above clause must be construed as a prohibition only

of the manufacture by S. of pressed metal truck frames and parts of such frames.

(2) That if the clause really interdicts the manufacture by S. of parts of a diamond truck frame out of pressed metal, it is in unnecessary and unreasonable restraint of trade and not enforceable.

No. 23 May T., 1895. In equity.

Opinion by *ACHESON*, Cir. J. Filed December 8, 1896.

On and prior to October 10, 1891, the date of the written contract between the plaintiff as party of the first part and the defendants as parties of the second part, both parties were engaged in the manufacture of centre plates for car trucks under patents owned by them respectively, the plaintiff at Chicago, Illinois, and the defendants at Pittsburgh, Pennsylvania. By the terms of the contract the plaintiff granted to the defendants the exclusive right to make centre plates under the plaintiff's patents and the defendants agreed to pay to the plaintiff seven and one-half per centum of the gross selling price of all centre plates sold by them; and it was stipulated that the plaintiff should have the right to make centre plates "for application to pressed metal truck frames manufactured by it," upon the payment of a named royalty, but should not otherwise engage in the manufacture of centre plates. The contract contains this provision:—

"It is further agreed that the parties of the second part will not engage during the life of this agreement in the manufacture of truck frames for moving vehicles or any part of such frames when made of pressed metal."

The present controversy grows out of a difference between the parties as to the meaning of this clause. The plaintiff contends that the clause prohibits the defendants not only from making pressed metal truck frames and parts of such frames, but also from making out of pressed metal any part of a truck frame of whatsoever kind the truck frame may be. The defendants maintain that the prohibition is against the making of pressed metal truck frames and parts of a pressed metal truck frame.

If the literal reading of the clause were determining, the plaintiff's construction might be entitled to preference. But in the interpretation of a particular clause of a contract, the court is required to examine the entire instrument, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made: *Rook Island Railway v. Rio Grande Railroad*, 143 U. S. 506. Moreover, the practical interpretation by the parties of an ambiguous clause of a contract is entitled to

great, if not controlling, influence: *Topliff v. Topliff*, 122 U. S. 121; and such practical construction, though at variance with the literal meaning of the clause, will prevail: *District of Columbia v. Gallaher*, 124 U. S. 505. Let us apply these principles here and see with what result.

From an examination of the whole paper of October 10, 1891, it is very clear that its main purpose was to regulate the manufacture of centre plates as between the parties. The clause in question is secondary and incidental. Its introduction at all into the paper would be inexplicable were it not that the plaintiff was engaged in the manufacture of pressed metal truck frames, as the contract itself discloses. That style of truck frame was peculiar, and was of comparatively recent origin and of limited use. The truck in ordinary use was, and is, the diamond truck, eighty-five or ninety per centum of all railroad freight cars in the United States being provided therewith. The diamond truck frame and the pressed metal truck frame are entirely different constructions. The plaintiff was not engaged in the manufacture of diamond truck frames. Its business was the manufacture of pressed metal truck frames. The plaintiff was thus interested to avoid rivalry in that particular branch of business—the manufacture of pressed metal truck frames and parts of such frames. The parties entered into the contract with the Fox pressed steel truck frame before them and with reference to the plaintiff's manufacture thereof. To the extent, then, that the restrictive clause secured the plaintiff freedom from competition in the manufacture of pressed metal truck frames and parts thereof, it may be regarded as having a basis in reason. But to carry the provision further would be unnecessary for the fair protection of the plaintiff and unreasonable.

Again, at the date of the contract, the defendants were engaged in the manufacture of pressed metal parts of diamond truck frames, and thereafter the defendants continued such manufacture with the knowledge of the plaintiff's principal officials and without objection. This course of manufacture by the defendants was acquiesced in by the plaintiffs until about the time of the filing of this bill on April 18, 1895. It is significant that the bill states that up until February, 1895, the defendants had complied with the terms of the contract. The occasion for the filing of the bill was that in February, 1895, the defendants began making and selling a pressed steel truck bolster. Whether the truck bolster is any part of a truck frame is a contested point. Now, without discussing the

evidence, it is enough for me to say that, influenced by the weight of the testimony of the practical experts, and from my inspection of the models, my conclusion is that the bolster is no part of a truck frame. Moreover, no truck bolster is used with a pressed metal truck frame. I am, then, quite unable to see how the plaintiff can justly claim that the manufacture of the bolster is within the prohibitory clause of this contract.

Upon the question of the proper construction of this clause, my opinion, under all the circumstances of the case, accords with the view upon which the defendants insist.

But finally, if, as the plaintiff contends, this clause really interdicts the defendants' manufacture out of pressed metal of any part of a diamond truck frame, then the clause, in my judgment, is in unreasonable restraint of trade and not enforceable: *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Gibbs v. Baltimore Gas Co.*, 180 U. S. 396, 409. The public interest is much promoted by the use of pressed metal parts in the repair or improvement of diamond truck frames. Now the plaintiff's business is the manufacture of pressed metal truck frames, and the evidence shows that its manufacturing capacity is fully taxed to meet the demand for that class of truck frames. This prohibitory clause, it will be observed, is without limit as respects place. To enforce it by the injunction here sought would be to deprive the public of the defendants' needed industry, and this, too, without reasonable benefit to the plaintiff. The covenants in restraint of trade hitherto sustained have been those connected with the sale or purchase of a business and its goodwill, or some analogous subject-matter, where the restraint was no more extensive than was reasonably necessary for the protection of the covenantor: *Nester v. Continental Brewing Co.*, 161, Pa. 473, 481. Here, however, there was no sale or purchase of any business relating to the manufacture of truck frames, and no circumstances existed to justify so sweeping a restriction as the plaintiff claims.

Let a decree be drawn dismissing the bill, with costs.

For plaintiff, *Cohen, Dickerson & Brown*.

For defendants, *Strawbridge & Taylor* and *Watson & McCleave*.

—Forfeited payments made by a member of a loan association on shares which lapse in consequence of his default are held, in *Pioneer Savings & L. Co. v. Cannon* (Tenn.) 83 L. R. A. 112, to be inapplicable to the mortgage debt and cannot be credited thereon.

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PRACTICE.

Making a Record for an Appellate Court.

BY BOYD CRUMBINE.

Query: How are the rulings of the court below upon offers of evidence, and the charge and answers to points, to be brought upon the record for review?

Janney v. Howard, 150 Pa. 339 (1892):

HEYDRICK, J.: "It was finally settled in *Lancaster v. De Normandie*, 1 Wh. 49, that an assignment of error would not be considered when it did not appear by the judge's certificate or memorandum that he filed the charge at the instance of one of the parties. And so the practice continued until the passage of the Act of March 24, 1877, P. L. 38. . . . The second section was manifestly drawn with reference to the construction put upon the Act of 1806 in *Lancaster v. De Normandie*. It is in these words: 'The charge and answer of the court to points in all cases where filed shall be part of the record for the purpose of assignment of errors.' If it was not intended to dispense with the necessity for the appearance on the record of a request to file the charge, it serves no purpose whatever, and it is not to be presumed that it was enacted without a purpose. *Under it error may be assigned in respect to any part of a charge which has been filed, with or without request, and whether excepted to in the court below or not.*"

Rosenthal v. Ehrlicher, 154 Pa. 396 (1893):

WILLIAMS, J.: As to exceptions to rulings on offers of evidence, the opinion refers first to the old practice of writing out the offer, objection, ruling, and the signing and sealing and filing of each bill of exceptions, during the trial, or simply noting the same, and the subsequent formal preparation, signing and sealing, and the filing of the bill; then discusses the appointment and the duties of the official stenographer: He is an officer of the court; his duty is to record fully and accurately all that transpires upon the trial; an offer should be entered at length, also the objection, and the ruling; if an

exception be taken this should be stated, and if the judge directs that an exception should be noted, this fact should be stated; the direction to note an exception or seal a bill must come from the judge. "When the stenographer's notes are completed in this manner they present a faithful transcript of all that occurred on the trial, and they show in their proper connection all that formerly went to make up a bill of exceptions.* . . . These notes, however, do not become a part of the record because the stenographer certifies to their accuracy, but they are made part of the record by order of the court that they may be written out and filed. When so filed they place upon the record a complete bill of exceptions upon every question on which an exception was in fact taken. . . . The bill is already settled and on the record when the stenographer's notes are filed under the direction of the court, and they may be copied therefrom and printed without further ceremony by an appellant."

As to exceptions to the charge and answers to points, the court, referring to the Acts of 1806, 1856, 1877 and 1887 (Stenographers), and considering *Patterson v. Kountz*, 63 Pa. 246, and *Morberger v. Hackenberg*, 13 S. & R. 28, proceeds: "The proper practice since the Act of 1877 is to except to the charge generally before verdict, as was done before the passage of that act. The party excepting should at the same time request that the charge and answers to points be written out and filed by the stenographer. If other exceptions than that to the judge's charge have been taken, the request may relate to the notes of the trial. This request may be entered on the stenographer's notes, but the better practice is to write it out and file it with the prothonotary. The request is then granted, the formal order directing that a copy of the charge, or of the notes of the trial, as the case may be, be written out and filed, is entered on the minute book or filed in the case. The stenographer then makes and files the copy, and the record is completely made up. Upon an appeal the appellant may assign error to every ruling upon the admission or rejection of evidence which was excepted to on the trial, and to any instruction appearing in the charge, or any answer to points, whether the particular point has been previously made the subject of an exception or not." *Dictum*: A firm of stenographers cannot certify to the notes of a trial.

Fries v. Null, 154 Pa. 573 (1893):

GREEN, J.: "A suggestion is made in the argument for the appellee that as no exception

* As to what a "bill of exceptions" is, see *post*, 206.

was taken in the court below by the appellant, either to the answers to points or to the charge of the court, error cannot now be assigned in those respects. It is sufficient to say that under the Act of 1877, P. L. 38, the points and answers become part of the record to which error may be assigned in this court, whether exceptions were taken in the court below or not. This matter has been very recently considered and decided by us in the case of *Janney v. Howard*, 150 Pa. 339."

Connell v. O'Neil, 154 Pa. 582 (1893):

MITCHELL, J.: "The appellant has no bill of exceptions." [See *post*, 206, as to "bill of exceptions."] The practice as to signing and sealing exceptions to rulings on offers of testimony under the use of stenographers, as directed in *Rosenthal v. Ehrlicher*, 154 Pa. 396, is approved, and the opinion proceeds: "The bill of exceptions fills the exact place it always did, it is equally indispensable as it was before, and though it may be taken down by the stenographer, yet it is not his act but that of the judge; . . . he can neither note an exception without the judge's direction, nor does his filing of his notes make them part of the record. That can only be done by the order of the judge for that purpose. When such order is given it is not necessary that the judge should actually affix his signature or seal, as was held in *Chase v. Vandergrift*, 88 Pa. 217, but the exception must be taken by the party, must be allowed by the judge, must be noted by the stenographer at his direction, and must appear on the bill, just as it did under the previous practice. And being thus, as it always was, the act of the judge, it becomes his duty to see that it is correct, and that his signature to the bill is a certificate of correctness on which this court can rely. . . . He should not only examine the bill personally but put upon it, before it becomes by his order part of the record, some mark, either by his own hand or by express direction, of such examination and approval. The proper practice as to having the exception allowed and noted is fully detailed" in *Rosenthal v. Ehrlicher*, "and I venture to add that, although under *Chase v. Vandergrift*, *supra*, actual signing of the bill by the judge is not necessary when the exception is noted by his direction, yet such signing is the better and a very desirable practice, for which the signature to the general certificate at the end of the record is a very slovenly and by no means adequate substitute. In fact, that certificate is by the court, not by the judge, in answer to the mandate of the writ from this court, and, in courts consisting of more than

one judge, is as often as not signed and sealed by other judges who did not try the case, and could not possibly certify to the correctness of the bill of exceptions." Commenting upon the Acts of 1806, 1877, 1887 and *Janney v. Howard*, 150 Pa. 339, it is left as decided in the case last cited, but deprecated, that the charge being on the record, under the Act of 1877 "any part of it is assignable for error, though no exception appears to have been taken in the court below."

Grugan v. Philadelphia, 158 Pa. 337 (1893):

It was urged for the appellee: "No exception was taken to the charge, and counsel on each side stated to the court (below) that they were satisfied therewith, and had no exception to take."

MCCOLLUM, J., said: "The objection that the charge cannot be reviewed here, because it was not excepted to in the court below, is answered by *Janney v. Howard*, 150 Pa. 339.

Hill v. Egan, 160 Pa. 119 (1894):

Trespass for malicious prosecution. The appellant printed the charge of the court, "but no bill of exceptions appeared of record," and no evidence was printed in the paper-book. And the record did not show that the charge was filed by the judge, or in obedience to his command.

MITCHELL, J.: "But, unfortunately for the appellant, we have nothing before us upon which to base a judgment. We have none of the evidence, for we have no bill of exceptions; even as to the charge, therefore, we could not pass upon it, for want of the facts to which it related. But the charge itself, though printed in the paper-book of appellant, is not of record. It nowhere appears to have been filed by the judge, or approved by him and filed by his order. The case therefore is not in position for us to afford appellant any relief." Referring to *Rosenthal v. Ehrlicher*, 154 Pa. 396; *Connell v. O'Neil*, 154 Pa. 582, and *Com'th ex rel. v. Arnold*, not then reported, the court recommended an allowance by the court below of a bill of exceptions *nunc pro tunc*.

Com'th ex rel. v. Arnold, 161 Pa. 320 (1894):

Rule in Supreme Court to show cause why special writ under Statute of Westminster 2d, should not issue to Hon. M. ARNOLD, directing him to seal a bill of exceptions.

The petition to the Supreme Court showed that a case had been tried in C. P. No. 4, Philadelphia county, on November 15, 17, 1892; that during the trial the counsel for the defendant, the petitioner, asked the court for and was

allowed exceptions to the refusal of the court to charge as requested in certain points, which exceptions were noted by the stenographer, and that leave was then granted to take exception to the whole or any part of the charge, but the court refused to note an exception to the specific language used in answering certain points, which language was set out; that subsequently, within the time limited by the rules of court, the petitioner presented to the judge a "bill of exceptions" prepared in the usual form, "consisting of the record of the trial of the cause and charge of the learned judge, as prepared by the official stenographer, whereto he had attached his official certificate as follows: 'I, . . . do certify that the foregoing is a true and correct transcript of the testimony, charge of the court, and exceptions allowed by the judge in the above cause; that this transcript is made and filed by order of said court; that the charge of the court has been approved by the judge who delivered the same and that the interlineations were made by me and marked by initials;'" yet the stenographer had refused to mark with brackets the portion of the charge referred to as objectionable; but that the judge declined to mark the said "bill of exceptions" presented as settled, and would not sign and seal the same at any time; that counsel for the plaintiff declined to agree to the specific marking; and that before and after submission to plaintiff's counsel, the trial judge stated that the transcript as already filed (not the one presented by counsel), with his certificate thereon as above stated, was all that was required, that no further action on his part was necessary, and refused to consider, settle, sign and seal the said "bill of exceptions."

The rule being awarded, the trial judge filed an answer showing that on January 9, 1892, the court had entered a general order requiring the official stenographers to file a long-hand typewritten report of each case reported by them, unless otherwise ordered by the court; that, during the trial of this case, "the defendant tendered an exception which I duly allowed and directed the official stenographer to note, which was done by him; and full stenographer's notes of the testimony and exceptions to rulings thereon allowed by me, and the charge which I delivered to the jury, were taken by the said E. Z. B., official stenographer aforesaid, and a typewritten copy thereof was duly made and filed among the records of said court;" that at the conclusion of the charge the defendant, by his counsel, tendered exceptions to certain parts of the charge, and requested leave to put brackets around the same when it should have been duly transcribed; that this was declined,

but the counsel was informed that he was at liberty to except to any part of the charge on his appeal to the Supreme Court, as authorized by *Janney v. Howard*, 150 Pa. 339; and that the subsequent requests were also declined "for the reason that the testimony, exceptions and charge already appeared of record in said cause, and that the second copy presented was not only superfluous and unnecessary, but that it unduly burdened the record with a duplicate of what was already in it."

MITCHELL, J.: Cited the Statute Westminster 2d, cases showing the old practice, and *Rosenthal v. Ehrlicher*, 154 Pa. 396, and *Connell v. O'Neil*, 154 *Id.* 582. "In the latter case the distinction established by the recent statutes, between exceptions to evidence, etc., and exceptions to the charge, and the true limits of the decision in *Janney v. Howard*, 150 Pa. 339, were definitely pointed out," and "it was held that the record must show affirmatively that the charge was filed by direction of the judge, and without such affirmative showing no act of the stenographer, in filing his notes, etc., could supply the place of a bill of exceptions. In the last two cases, however, it was said, in deference to *Chase v. Vandergrift*, 88 Pa. 217, that if the judge's direction to file the notes distinctly appeared, he need not personally sign the bill of exceptions or the notes of his charge. . . . The Statute of Westminster of course contemplated the actual sealing of the bill with the judge's own seal, which he was subsequently called upon to acknowledge or deny, unless the bill was tacked to the record and came up with it, in which case the seal was assumed to be that of the judge: *Buller's Nisi Prius*, 316; *Whithers v. Gillespie*, 7 S. & R. 15. With the changes of custom and the diffusion of education, the written signature has in practice taken the place of the seal, as the important element of the certification. . . . When the Act of May 24, 1887, P. L. 199, required the stenographer to take notes of the charge and file them of record, . . . it did not intend, nor could it even if intended, dispense with the necessity of the judge's personal examination and certification of the correctness of the notes filed. The charge is his charge, and the filing is his act, and the Statute of Westminster, still in force, the Act of 1806 and the Act of 1887, alike require that he should do it in person and certify his so doing by his own signature. . . . We are not disposed to stand on mere forms. That the record is true and the judge so declares, is the substance; the form is not very material. He may so declare by formal bills with his seal, or he may adopt the notes of the stenographer as verity and so

declare by his certificate at the end of the stenographic report, certifying to its correctness as a whole. If he chooses to multiply his certificate by affixing one, with his seal appended, to every exception to the admission or rejection of evidence, that certainly will not affect the verity of the record. But the distinct assent of the judicial mind to the truth of that part of the record made up by the stenographer, must appear of record by the certificate of the judge under his own hand. He may make as many certificates as he pleases, but he must make at least one which discloses his belief that the stenographic notes are verity, and that he so declares. . . . Upon the general question, therefore, we are of opinion that the stenographer's notes of evidence, exceptions, and the charge when filed of record, should be certified by the signature of the judge. . . . The petition, in the present case, however, goes a step farther, and seeks to have the judge mark certain parts of the charge as specifically excepted to, by enclosing them in brackets or similar device. This was the correct practice formerly, to show the exceptions when they were required to be made specifically in the court below at the time of the trial. But since the change introduced by the recent acts, making the whole charge when filed by the judge open to the assignment of errors, that practice, though still convenient and commendable, is not obligatory, and the judge below is entitled to use his own discretion about it. Nor is the judge, after having certified and filed of record in his court, the transcript of the evidence showing the exceptions, and the charge, under any obligation to sign a second or separate bill for the party."

Pool v. White, 171 Pa. 500 (1895):

Motion to quash appeals, showing: That every assignment of error was to the charge of the court and answers to points; that no exception was taken by appellant's counsel, either to the charge or to the answers to points complained of; that no request was made by the counsel before the verdict for an order directing the charge to be filed and made matter of record, to enable them to except thereto; that no order was made after the verdict, directing the stenographer to write out the charge and answers to points, and file them of record; that there is no certificate by the trial court attached to the record, showing that the charge now printed in the paper-book to which the errors are assigned, has been found to be correct, and is therefore directed to be filed as part of the record.

It appeared that KENNEDY, P. J., attached to

the record, after it was filed in the Supreme Court, a certificate that the charge as printed was correct, but he declined to order it filed or otherwise made a part of the record.

Wentling et al., for the motion to quash, cited: *Rosenthal v. Ehrlicher*, 154 Pa., p. 403; *Connell v. O'Neill*, 154 Id., p. 589; *Hill v. Egan*, 160 Id. 122; *Com'th ex rel. v. Arnold*, 161 Id. 827.

Laird & Keenan et al., contra, cited: *Janney v. Howard*, 150 Pa., p. 343; *Fries v. Null*, 154 Id., p. 581; *Hill v. Egan*, 160 Id. 122; *Rosenthal v. Ehrlicher*, 154 Id. 402; *Com'th ex rel. v. Arnold*, 161 Id. 320.

Per Curiam, Oct. 8, 1895. "Appeals quashed."

On Oct. 29, 1895, the Supreme Court made the following order: "These appeals were quashed, for want of anything to show how the charge of the trial judge came into the hands of the prothonotary of the court in which they were tried. There was no general exception, no request to have the charge written out and filed, no order upon the stenographer to prepare and file a copy, no certificate by the judge that the copy filed was correct. So far as appeared a typewritten copy might have been procured by any person interested in the cases, and filed by him without the knowledge of the judge. This difficulty has been since removed. The learned judge has certified as to the correctness of the charge and ordered it filed. We are now asked to restore these cases to their place on the list." Thereupon it was so ordered, and the cause heard. See *Pool v. White*, 175 Pa. 459.

COMPARATIVE SUMMARY.

1. As to charge and answers to points:

"Error may be assigned to any part of a charge which has been filed, with or without request, and whether excepted to in the court below or not." HEYDRICK, J., in *Janney v. Howard*, 150 Pa. 339.

"The proper practice is to except to the charge generally before verdict. . . . The party excepting should at the same time request that the charge and answers to points be written out and filed by the stenographer. . . . This request, which may relate also to rulings on offers of evidence, may be entered in the stenographer's notes, but the better practice is to write it out and file it with the prothonotary. . . . Upon an appeal, the appellant may assign error . . . to any instruction appearing in the charge or any answer to points, whether the particular point had been previously made the subject of an exception or not." WILLIAMS, J., in *Rosenthal v. Ehrlicher*, 154 Pa. 396.

"Under the Act of 1877, P. L. 88, the points and answers become part of the record to which

error may be assigned in this court, whether exceptions were taken in the court below or not:" GREEN, J., in *Fries v. Null*, 154 Pa. 573.

The charge, etc., being properly on the record, under the Act of 1877 "any part of it is assignable for error, though no exception appears to have been taken in the court below:" MITCHELL, J., in *Connell v. O'Neil*, 154 Pa. 582, following but deprecating *Janney v. Howard*, 150 Pa. 339.

"The objection that the charge cannot be reviewed here, because it was not objected to in the court below, is answered by *Janney v. Howard*, 150 Pa. 339:" MCCOLLUM, J., in *Grugan v. Philadelphia*, 158 Pa. 337.

"We have no bill of exceptions. Even as to the charge, therefore, we could not pass upon it, for want of the facts to which it related. But the charge itself, though printed in the paper-book of appellant, is not of record. It nowhere appears to have been filed by the judge, or approved by him or filed by his order:" MITCHELL, J., in *Hill v. Egan*, 160 Pa. 119.

"The record must show affirmatively, that the charge was filed by the direction of the judge, and, without such affirmative showing, no act of the stenographer in filing his notes, etc., could supply the place of a bill of exceptions. . . . If the judge's direction to file the notes distinctly appeared, he need not personally sign the bill of exceptions or the notes of his charge. . . . The written signature has in practice taken the place of the seal, as the important element of certification." The Act of 1887 (Stenographers') could not "dispense with the necessity of the judge's personal examination and certification of the correctness of the notes filed. The charge is his charge. "We are of opinion that the stenographer's notes of evidence, exceptions, and the charge when filed of record, should be certified by the signature of the judge." And to note specific exceptions to the charge was the correct practice formerly, "but since the changes introduced by the recent acts, making the whole charge when filed by the judge open to the assignment of errors, that practice, though still convenient and commendable, is not obligatory, and the judge below is entitled to use his discretion about it:" MITCHELL, J., in *Com'th ex rel. v. Arnold*, 161 Pa. 320.

"These appeals were quashed for want of anything to show how the charge of the court came into the hands of the prothonotary of the court below in which they were filed. There was no general exception; no request to have the charge written out and filed; no order upon the stenographer to prepare and file a copy;

no certificate by the judge that the copy filed was correct:" *Pool v. White*, 175 Pa. 459.

2. Rulings on offers of evidence:

An offer should be entered at length, also the objection and the ruling; if an exception is taken this should be stated, and if the judge directs that an exception should be noted, this fact should be stated; and the direction to note an exception or seal a bill must come from the court. The stenographer's notes when written out and certified by the stenographer, and filed, which filing must appear to have been done by the direction of the judge, become a part of the record of the cause and the bill is then already settled. And "upon an appeal the appellant may assign error to every ruling upon the admission or rejection of evidence which was excepted to on the trial:" WILLIAMS, J., in *Rosenthal v. Ehrlicher*, 154 Pa. 396.

The filing of the stenographer's notes does not make them part of the record. "That can only be done by the order of the judge for that purpose. . . . It is not necessary that the judge should actually affix his signature or seal, . . . but the exception must be taken by the party, must be allowed by the judge, must be noted by the stenographer at his direction, and must appear on the bill, . . . and being thus . . . the act of the judge, it becomes his duty to see that it is correct, and that his signature to the bill is a certificate of correctness on which this court can rely. Actual signing of the bill by the judge is not necessary when the exception is noted by his direction, yet such signing is the better and a very desirable practice, for which the signature to the general certificate at the end of the record is a very slovenly and by no means adequate substitute:" MITCHELL, J., in *Connell v. O'Neil*, 154 Pa. 582.

In deference to *Chase v. Vandergrift*, "if the judge's direction to file the notes distinctly appears, he need not personally sign the bill of exceptions or the notes of his charge. . . . The written signature has in practice taken the place of the seal, as the important element of the certification." The Stenographer's Act of 1887 did not and could not "dispense with the necessity of the judge's personal examination and certification of the correctness of the notes filed." The Statute of Westminster and our acts "alike require that he should do it in person and certify his so doing by his own signature. . . . He may so declare by formal bills with his seal, or he may adopt the notes of the stenographer as verity, and so declare by his certificate at the end of the stenographic report, certifying to the correctness as a whole. . . .

He may make as many certificates as he pleases, but he must make at least one which discloses his belief that the stenographic notes are verity, and that he so declares. . . . Upon the general question, therefore, we are of opinion that the stenographer's notes of evidence, exceptions, and the charge when filed of record, should be certified by the signature of the judge:" MITCHELL, J., in *Com'th ex rel. v. Arnold*, 161 Pa. 320.

REMARKS.

An examination of the cases hereinbefore cited discloses, it is thought, at least a little confusion; everything is not quite as clear as it should be. But the Supreme Court, not deciding questions actually arisen, in most of the cases endeavored to lay down rules for future cases, and, as in drawing an oil lease, found it was not so easy to think of and remember everything and provide for all possible contingencies.

One source of confusion was perhaps the fact that what is ordinarily meant by a bill of exceptions outside of Philadelphia, is not just the same as is meant inside. Before we began to railroad cases through a trial, an offer of testimony was made, written out if demanded, and the objection added, when the trial judge followed by the ruling in writing, and if requested noted an exception and verified the whole by his signature and seal; and this was called a "bill of exception." This bill, and others, were filed of record in the case, and when the record was made up they with the charge and the judge's notes of the testimony, or those of counsel when adopted, were all fastened together with the paper filed, as the whole record. See *Rosenthal v. Ehrlicher*, 154 Pa., pp. 399-400. And see *Forsythe v. Matthews*, 14 Id. 101 (1849).

But the Philadelphia lawyer, when he thinks of a bill of exceptions, has in mind a different thing. For instance: "The bill of exceptions is extremely imperfect, no notes of testimony apparently having been taken except those by the judge, which were merely for his own use and much abbreviated and incomplete." Mr. Justice MITCHELL, in *Com'th v. Ribert*, 144 Pa., p. 415 (1891). "We have no bill of exceptions. Even as to the charge, therefore, we could not pass upon it, for want of the facts to which it related." Mr. Justice MITCHELL, in *Hill v. Egan*, 160 Pa., p. 122. In Philadelphia it seems that the practice is to present to the trial judge, within ten days, a formal "bill of exceptions" showing briefly all the proceedings on the trial, and the offers and rulings excepted to, and the charge to the jury, the whole certified at the end and signed and sealed by the trial judge. This

"bill of exceptions" is then printed in the appendix to the paper-book. See Reporter's Note to *Com'th v. Ribert*, *supra*, and the chapter on the subject in 2 Brewster's Pr. 1249, *et seq.* Undoubtedly the practice is technically correct.

3 Encyc. Pl. & Pr. 378: "A bill of exceptions is a formal statement in writing of exceptions taken by a party on the trial to a ruling, decision, charge, or opinion of the trial judge, setting out the proceedings on the trial, the acts of the trial judge alleged to be erroneous, the objections and exceptions thereto, together with the grounds therefor, and authenticated by the trial judge according to law."

Ibid. 385: "Under the old practice each exception taken on the trial was written out and authenticated as a separate instrument, called a special bill of exceptions. This seems to be still allowable, but under modern practice the mode generally adopted is to include all the exceptions taken on the trial in one bill, called a general bill."

WHAT MAY BE TAKEN AS SETTLED.

1. As to charge and answers to points:

Although, in *Janney v. Howard*, 150 Pa. 339 (followed by *Fries v. Null*, 154 Id. 573; *Connell v. O'Neill*, 154 Id. 582; *Grugan v. Philadelphia*, 158 Id. 337), it was decided that "error may be assigned to any part of a charge which has been filed, with or without request, and whether excepted to or not," "yet, the proper practice is to except to the charge [and answers to points] generally, before verdict;" and "the party excepting should at the same time request that the charge and answers to points be written out and filed by the stenographer." *Rosenthal v. Ehrlicher*, 154 Pa. 396, *ante*, 201; *Hill v. Egan*, 160 Id. 119, *ante*, 202; *Com'th ex rel. v. Arnold*, 161 Id. 320, *ante*, 202; *Pool v. White*, 175 Id. 459, *ante*, 204. And when the charge and answers are so filed by request of counsel and upon the order of the court, "the appellant may assign error . . . to any instruction appearing in the charge or any answer to points, whether the particular point had previously have been made the subject of an exception or not." *Rosenthal v. Ehrlicher*, 154 Pa. 396, *ante*, 201; *Com'th ex rel. v. Arnold*, 161 Id. 320, *ante*, 202.

2. As to rulings on offers of evidence:

The stenographer's notes, when written out, should show the offer as made, the objection as made, and the ruling of the court as made; and, if an exception be requested and granted, that by direction of the court an exception is sealed for the party ruled against. The trial judge, on examination and approval, may authenticate

each exception by his signature and seal, or by his signature alone, but it is not absolutely necessary. Yet, to make the exception, when not specially thus authenticated, available for an assignment of error, there must be found at the end of the stenographer's report, and after the stenographer's certificate the certificate of the trial judge showing his personal examination and approval of the report of the stenographer, and upon an appeal the appellant may assign error to every ruling upon the admission or rejection of evidence to which an exception was noted upon the trial: *Rosenthal v. Ehrlicher*, 154 Pa. 396, ante, 201; *Connell v. O'Neil*, 154 Id. 582, ante, 202; *Com'th ex rel. v. Arnold*, 161 Id. 320, ante, 202.

FORMS SUGGESTED.

- (1. For the Heading to the Stenographer's Notes when written out.)

GENERAL BILL OF EXCEPTIONS.

..... } In the Court of Common Pleas of
 vs. } County.
 } No. Term,
 Appearances: for plaintiff.
 for defendant.

Before Hon. J.

Jury called and sworn

PLAINTIFF'S CASE IN CHIEF.

- (2. For offer of evidence, ruling and exception.)

The plaintiff offers to prove by the witness on the stand: That, etc.

The defendant objects to the offer as incompetent and irrelevant.

By the Court: Offer admitted, and on request of the defendant, exception allowed and sealed.

(Here, it is better to leave a blank line in the notes as written out, for the signature and seal, or signature alone, of the trial judge, in case it is desired to have the exception sealed specially.)

- (3. For exception to charge, etc., and order for filing by the Stenographer.)

And now,, before verdict and upon request exception to the charge and answers to points is noted and sealed for the plaintiff (or defendant); and upon request of the plaintiff (or defendant) it is ordered that the notes of the testimony submitted, the offers and rulings and orders made during the trial, with the charge to the jury and the answers to points, be written out and filed by the stenographer, as part of the record.

By the Court.

..... J.

- (4. For Stenographer's Certificate at the end of his notes as written out. See Act of May 24, 1887, P. L. 199; 2 *Purd.* 1944, pl. 4.

I,, Official Stenographer of the Court of Common Pleas of County, do hereby certify that the foregoing is a full, true and correct transcript of my stenographic notes of testimony

on the trial of this cause, with the judge's charge, the points for instruction and the answers thereto, and with every ruling and order of the judge relating to the case upon trial and made in any stage of the proceedings.

.....
 Official Stenographer.

- (5. For the certificate of the trial judge, to follow the preceding and close the "bill of exceptions.")

..... County, ss.

I, J. of the Court of Common Pleas of the said county, do hereby certify that I have personally examined the foregoing transcript of the stenographer's notes, in the foregoing cause, and that I approve the same as containing a full, true and correct presentation of the testimony submitted, with the offers of evidence made, objections thereto, and the rulings and orders of the court thereon, and exceptions, and with the charge to the jury and answers to points, and the exceptions thereto; and upon request of counsel interested the same is ordered to be filed.

..... [SEAL]
 J.

Supreme Court, Penn'a.

In re Assigned Estate of JAMES WHITE et ux.

BROWN'S APPEAL.

An order for the sale of real estate in the hands of an assignee for the benefit of creditors will be granted by the court where it appears that the interest of all parties concerned will be better subserved; and where the titles made by the assignee are regarded as doubtful and there is a difficulty of making an advantageous sale, even though the amount of liens against the real estate is greater than its appraised value.

Where in such a case the discretion of the court is exercised and an order of sale granted it will require very clear and satisfactory proof of either an abuse of discretion or a manifest disregard of the plain rights of the execution creditors, under all the evidence, to induce an appellate court to reverse the action of the court granting the order.

Appeal of John D. Brown, assignee of Peter S. Pool & Son, from the judgment and decree of the Court of Common Pleas of Westmoreland county, in the matter of the voluntary assignment of James White and wife to Edward E. Robbins, for an order to allow him to sell the assigned real estate.

For appellant, *John F. Wentling, David A. Miller and Edward B. McCormick.*

Contra, P. H. Gaither, H. P. Laird, C. E. Woods, J. B. Keenan, E. E. Robbins and J. E. Kunkle.

Opinion by GREEN, J.* Filed November 9, 1896.

It appears by the report of the commissioner in this case that the appraised value of the property for which the order of sale was asked was

\$69,807.67, while the total amount of the liens affecting the same was \$102,623.84. The real estate in question consisted of fourteen different tracts of land and interests therein, thirteen of which were situated in Westmoreland county, and one in Washington. The properties were of various kinds, consisting of farms, houses, and lots in villages, and tracts of coal land, in some of which the assignor owned undivided interests with other persons, and some of which he owned entirely. Some of the properties were held by fee-simple title, and others by equitable title only. Among the reasons set forth in the petition for granting the order of sale are the following: "The petitioner further represents that because of the number of properties, the varied character, quality, and value thereof, and the undivided interests held aforesaid, and equitable titles dependent upon final decree, in his judgment a sale thereof by execution on the part of the sheriff would be not only to the disadvantage of the said James White, but would be working a manifest injury to many of his lien creditors." The petitioner also averred that, if an order of sale was granted, he would be able to sell the several tracts on the premises on more favorable terms, and with the opportunity of making subdivisions of such portions of the lands as were contiguous to villages and towns, and by these means he would be able to make more favorable sales, to the advantage of both the assignor and his lien creditors. It is alleged in the appellee's counter statement, and not denied, that all of the numerous creditors of the assignors, except this appellant, acquiesced in the petition. It also appears that a contest was pending as to the validity of the appellant's judgments, and it is alleged that, if that contest terminates favorably to the assignor, the amount apparently due on these judgments would be largely diminished. It is also set forth that, in one contest already had respecting these judgments, a diminution of their amount was effected, to the extent of \$35,000; and, since that, other facts have been discovered tending to establish a further defense to the judgments in Washington county, and that a rule to show cause why they should not be opened had already been obtained.

It is only necessary to refer to these allegations as tending to show a state of uncertainty as to the amount of the liens, and, consequently, as to the question whether, in the language of the Act of 1876, it is "difficult to determine whether the same [the lands] can be sold for enough to pay all the liens." Before granting the order of sale prayed for, the court appointed a commissioner to ascertain the liens affecting

the real estate in question, and the extent to which they affect the properties respectively. The commissioner thus appointed subsequently made an extended report, describing the various properties and the very numerous liens affecting them. The result of this report developed a very complicated situation in regard to the character, extent and distribution of the liens among the various properties. There was a considerable number of mortgages, some of which would be discharged by a sheriff's sale, and others not, and some of which were paid, either in part or in whole. Some of the judgments were liens upon parts of the properties only, and others upon other parts, all of which were carefully specified and described.

Upon an examination of the whole record, it seems to us that this was a very proper case in which an order of sale to the assignee should be granted, not only in the interest of the assignor, but also of all his creditors. A sheriff's sale or sales of such a mass of properties, with such a confused condition of the liens upon them, would almost certainly be attended by disastrous results in the prices obtained, all of which could be probably averted by assignee's sales made with care and deliberation, and at carefully selected times, and in limited parcels. In view of the fact that the discrepancy between the estimated value of the aggregated properties and the amount of the liens is not very great, and is an uncertain quantity, which may result in an amount of sales larger than the estimate, and an amount of liens less than is apparent on the records, we do not think there is anything in the Act of 1876 which would deprive the court of its jurisdiction to entertain the petition, and to grant the order. The jurisdiction is not measured by any exact terms or precise limitations. The event upon which the power to grant an order of sale arises is itself an uncertainty. It is the difficulty of determining whether the real estate of a voluntary assignor for the benefit of creditors can be sold for money enough to pay all the liens against it. No one can absolutely decide such a question in advance, and considerable latitude must always be allowed in determining whether to exercise the power. Moreover, there are other reasons for its exercise than the one thus stated, and they appear in the act. They are found in these recitals, "Whereby the titles made by the assignees are regarded as doubtful, and the assignees are thereby unable to make advantageous sales of said real estate;" and, "Where the said court shall deem it for the manifest interest of all parties authorizing and empowering the said assignees to make public sale of said

real estate." These considerations, briefly expressed, are: (1) The doubtful character of the title made by assignees; (2) the consequent difficulty of making advantageous sales; (3) the manifest interest of all parties concerned. In construing the statute, it is essential that all the matters should be regarded. Having, then, in view the difficulty of determining whether the lands can be sold for enough to pay off the liens, the doubtful character of the title made by assignees before the Act of 1876 was passed, the resulting difficulty of making advantageous sales, and the manifest interest of all the parties concerned in the particular case, it must be also considered that the court to which the application for the order of sale is made has a discretionary power to grant or refuse the order. When that discretion is exercised, and an order is granted, it will require very clear and satisfactory proof of either an abuse of discretion, or a manifest disregard of the plain rights of execution creditors, under all the evidence, to induce an appellate court to reverse the action of the court below. In the present case we not only do not see any reason for such action on our part, but, on the contrary, we are well convinced that the granting of the order of sale in question was a wise and judicious exercise of the power of the court below. Instead of proving a loss to any of the lien creditors of the assignor, we think a sale made in this way will result far more to the advantage of all than any possible sheriff's sale.

In the case of *In re Pauley's Estate*, 149 Pa. 196, we said: "Upon the facts of the application for the order of sale, we think it clearly apparent that the case is one eminently proper for the exercise of the power of the court to grant the order. The act was intended, and it expressly so declares, to apply to cases where the real estate is 'encumbered with liens to such an extent as to render it difficult to determine whether the same can be sold for enough to pay all the liens. That was precisely the case here. The liens were somewhat in excess of the appraised value, but the appraised value may not be the real value, and may not be so much as the proceeds of the sale. It is alleged here that the liens are stated excessively in respect that one of them is duplicated in the amount of another. We do not think the difference even in the amount of the appraised value and the aggregate of the liens as most largely stated is sufficient to relieve the case of the uncertainty which gives the court jurisdiction to grant the order." In that case the property was appraised at \$24,144.97, and the amount of the liens as stated was \$31,830.75, the excess of liens being

nearly 30 per cent. greater than the appraised value. In the present case the difference is not much greater than that, taking the lowest estimate of the property, and the highest estimate of the liens; while if the highest estimate of the property be assumed, and the lowest estimate of liens, there is scarcely any difference in the amount. In *Appeal of Thompson*, 126 Pa. 467, an order of sale granted by the court below was affirmed at bar by this court, the lien creditors having averred in their answer to the assignee's petition that the lands were appraised at \$194,053.33½, and the liens did not exceed the sum of \$90,000, and therefore there was no difficulty in determining whether the lands would yield enough to pay all the liens. Notwithstanding this wide divergence, we held that the order of sale was properly granted, and refused to interfere.

The reasons we have already stated are sufficient to sustain the order granted by the learned court below, and we therefore dismiss the assignment of error. The decree of the court below is affirmed, at the cost of the appellant, and the record is remitted for further proceedings.

Orphans' Court.

In re Estate of SARAH J. MCCONNELL, Dec'd.

The Act of June 30, 1885, relating to intestates, does not repeal the Act of April 27, 1855, so far as it creates new classes of collaterals, but only so far as it provides for a *per stirpes* distribution.

No. 26 Oct. T., 1896. Sur exceptions to decree.

Opinion by OVER, A. J. Filed December 16, 1896.

The decedent died on the 30th day of July, 1895, intestate, leaving to survive her of kin only an uncle and two children of a deceased uncle. The auditing judge distributed one-half of the fund in the administrator's hands to the uncle, and the other half to the children of the deceased uncle, to which exceptions are filed, it being alleged that the whole fund should have been distributed to the uncle. The 8th section of the Intestate Act of April 8, 1833, provided that there should be no representation admitted amongst collaterals after brothers' and sisters' children, under this section where there were surviving uncles or aunts, the children of deceased uncles and aunts were excluded: *Parr v. Bankhart*, 22 Pa. 291. But to remedy this the Act of April 27, 1855, P. L. 368, was passed, the second section being as follows:

"Among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among the

grandchildren of brothers and sisters, and the children of uncles and aunts, by representations; such descendants taking equally among them such share as their parent would have taken, if living."

This act constituted the grandchildren of brothers and sisters, and the children of uncles and aunts additional classes of collateral heirs as *contra* distinguished from next of kin, and as to these two classes made the rule of distribution *per stirpes*: *Hays' Appeal*, 89 Pa. 256; *Krouts' Appeal*, 60 *Id.* 380; *Brenneman's Appeal*, 40 *Id.* 115; *Lane's Appeal*, 28 *Id.* 487.

If this act is still in force the decree is undoubtedly right, but it is contended that it was repealed by the Act of June 30, 1885, P. L. 251, the title and enacting clause of which are as follows: "'An Act providing for the manner in which estates of intestates shall be distributed where the distributees stand in the same degree of consanguinity to the intestate.'" 'Section 1. Be it enacted, That whenever by the provisions of the intestate laws of this Commonwealth, it is directed that real and personal estates shall descend to or be distributed among several persons, whether linea! or collateral heirs, or kindred standing in the same degree of consanguinity to the intestate, if there be only one of such degree, he shall take the whole of such estate; and if there be more than one, they shall take in equal shares; and if real estate, shall hold the same as tenants in common.'"

Under the 14th section of the Act of 1833, when the collaterals stood in the same degree, the distribution was *per capita*; but under the Act of 1855, as to the two new classes of collaterals created by it, the distribution was *per stirpes*. The purpose of the Act of 1885, which is a *verbatim* re-enactment of the 14th section of the Act of 1833, evidently was to make the rule of distribution uniform, by providing in all cases for a *per capita* distribution, where the persons entitled stand in the same degree of consanguinity to the intestate, and therefore repeals the Act of 1855, only so far as it prescribes the method of distribution: *Gremer's Estate*, 156 Pa. 40. There is no intention expressed, nor implied to repeal, or modify the act, so far as it creates new classes of collaterals. The title to the Act of 1885 shows that it only applies to cases where the distributees stand in the same degree of consanguinity to the intestate; and as here they stand in different degrees, it does not apply to this case. The exceptions to the decree are therefore dismissed.

For accountant, *J. W. Kinnear*.

For exceptant, *A. E. Anderson* and *H. Q. Turner*.

In re Estate of JOHN KALBFELL, Deceased.

Nothing short of the most clear and unambiguous language in a will or agreement will make the general estate of a deceased partner liable for debts contracted subsequently to his death.

In a mercantile business a surviving partner has authority to make small purchases of some articles to render the stock more salable to enable him to close out the business.

Such purchases are expenses of the administration of the firm assets and entitled to preference in their distribution. The estate of the deceased partner is also liable therefor.

No. 230 Sept. T., 1896. Audit executor's account.

OVER, A. J.

STATEMENT.

John Kalbfell, the decedent, who died testate on the 19th day of June, 1894, at the time of his death was a partner with H. L. Berger in the wholesale liquor business. Their agreement provided, *inter alia*, as follows:

First.—Said copartnership shall continue from this date for and during the full term of five years, unless dissolved by mutual consent: provided, however, in the event of John Kalbfell's death his son Henry shall take his place in said partnership, and all the rights and duties of the deceased; in the event of the death of said H. L. Berger, his wife shall take his place and interest in said copartnership.

No provision was made in the will for continuing the partnership business. His son Henry did not take the decedent's place in the firm; but Berger, the surviving partner, conducted the business until the 4th day of October, 1894, when a receiver was appointed by the Court of Common Pleas No. 3. Berger testified, "It was finally decided that we should run the business until we could find a purchaser to sell the business as a whole, inasmuch as we could then get something for the goodwill of it, whereas, if the business was sold at a forced sale, nothing could be gotten for the goodwill."

Upon the distribution of the partnership assets, the firm creditors were paid about forty-two per cent. of their claims. The claims of some of the creditors to whom distribution was made included charges for goods furnished after the death of Kalbfell, upon which a *pro rata* distribution was also allowed. The auditor found that Berger, the surviving partner, and Henry Kalbfell, the executor, were making diligent efforts to dispose of the business; that "in order to carry on said business and to realize as much as possible therefor, it was necessary to some extent to keep up the stock and hold the trade together; and that said course was the wisest one."

Objections are made here to the claims

for goods furnished subsequently to Kalbfell's death.

OPINION. Filed December 17, 1896.

It is alleged that the partnership agreement provided for a continuance of the business, and that decedent's individual estate is therefore liable for the goods furnished after his death.

There is a marked distinction between the agreement here, and that in *Laughlin v. Lorenz*, 48 Pa. 283, relied on by claimants. There the agreement provided "that in case of the death of any of the partners, the business shall be continued by the surviving partner" for a specified period, and then closed up in such a manner as should be decided upon. Here there is no provision for the continuation of the partnership by John Kalbfell's executor, and it was evidently intended that upon his death a new partnership should be formed by his son succeeding him in the firm. Had this been done no doubt the capital the decedent had invested would have been liable for debts subsequently contracted; but the general estate clearly would not be liable. The case for the claimants is not nearly so strong as in *Stewart v. Robinson*, 115 N. Y. 328, where the agreement was that in the event of the death of either partner, the firm should not be dissolved, but that the wife and children of the decedent should succeed to his interest and the business be prosecuted for their and the surviving parties' benefit. And it was held that the capital actually invested was alone liable for the debts contracted after the death of the partner.

It is well settled that nothing short of the most clear and unambiguous language in a will or agreement will make the general estate of a deceased partner liable for debts contracted subsequently to his death: *Wilcox v. Derickson*, 168 Pa. 331, and cases there cited: *Keeling v. Ihmsen*, 26 PITTSBURGH LEGAL JOURNAL, 191. And as there is nothing in the agreement in this case to show that it was the intention that the general estate of John Kalbfell should be liable for debts incurred after the dissolution of the firm by his death, the claimants cannot recover under the agreement. It is contended, however, that the business was conducted, and the goods furnished for the purpose of the proper administration of the firm assets, so that the business and stock could be sold to better advantage, and that therefore the estate is liable for them. In Story on Part., sec. 344, it is said: "Although as to future dealings a partnership is terminated by the death of one of the partners, yet it may be said to subsist so far as is necessary to enable the surviving partner to wind up and settle the

affairs of the partnership." And in Bates on Part, sec. 728, that "liability for expenses proper to the legitimate winding up of the business as distinguished from continuing it may be incurred." Thus the surviving partner may bring suits to collect debts, and if he fail in them the estate of the deceased partner must contribute to pay the costs: *Allen v. Blanchard*, 9 Cow. 631. He can also borrow money to complete unfinished work, and manufacture raw material salable only at a sacrifice, and pay the loan out of the firm assets: *Calvert v. Miller*, 94 N. Ca. 600. And in a mercantile business has authority to make small purchases of some articles to render the stock more salable to enable him to close out the business: *Oliver's Adm'r v. Forrester*, 96 Ill. 323. This was a mercantile business, the purchases appear to have been made to enable the surviving partner to dispose of it to better advantage, and the court having jurisdiction of and distributing the partnership assets, have in effect found they were proper and necessary. They are expenses of the administration of the firm assets proper to the legitimate winding up of the business as distinguished from continuing it, and as such should have had preference in their distribution. It is true, the decedent's estate does not appear to have been benefited by the course pursued, and the strong probabilities are it was not; but these claimants are not responsible for the result. Had they enforced their preference in the distribution of the firm assets, the general creditors would have received that much less, and their claims here been increased to that extent; so that there is at least a strong equity in favor of these claimants." Aside from this, however, as the surviving partner had authority to make the purchases, the estate is liable. The claims are therefore allowed.

For accountant, *R. B. Scandrett* and *Alex. Gilfillan*.

For creditors, *Joseph Stadtfeld*.

In re Estate of JOHN KALBFELL, Deceased.

It is the duty of the grantor, to whom a grantee delivers a defeasance, under the Act of June 8, 1881, to have it recorded; and the grantee cannot be prejudiced by the grantor's neglect of this duty.

When the grantor neglected to record the defeasance, the grantee is entitled to distribution of his claim, for which the land was conveyed as collateral, having tendered a reconveyance out of the deceased grantor's estate.

No. 230 Sept. T., 1896. Audit executor's account.

OVER, A. J.

STATEMENT.

The German National Bank of Pittsburgh has

presented a claim against this estate upon a note for \$7,333.26, dated February 16, 1894, discounted by it for Kalbfell, made by him payable four months after date to the order of H. L. Berger, and by him indorsed. The bank was not satisfied with the indorser on this note, and as additional security for its payment Kalbfell conveyed by deed, dated February 26th and acknowledged February 27, 1894, to A. Groetzing (its president) in his individual name certain real estate, the consideration mentioned being \$9,000. He by paper dated February 27, 1894, executed under his hand and seal, and delivered to the grantor, agreed that upon the payment of \$7,333.26, to him in one year from the date thereof, to convey to John Kalbfell the land mentioned in the deed. This paper was neither acknowledged nor recorded. It is conceded that the property is not worth the amount of the bank's claim. A. W. Mellon, as vendee, assignee and mortgagee of some of the devisees of John Kalbfell, objects to this claim, alleging that the deed to Groetzing, under the Act of June 8, 1881, relating to the recording of defeasances, was absolute and therefore operated as payment of the bank's note. Groetzing offers to convey the property to Kalbfell's heirs or devisees upon the payment of the claim.

OPINION. Filed December 17, 1896.

Although the deed from Kalbfell was made to Groetzing in his individual name, yet the purpose was to secure the payment of the note discounted by the German National Bank, and as he was its president, he held the title as its trustee. This case then must be considered as if the deed had been made directly to the bank, and the defeasance had been executed by it. The Act of June 8, 1881, P. L. 84, provides as follows: "No defeasance to any deed for real estate, regular and absolute on its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the lands are situated, within sixty days from the execution thereof; and such defeasance shall be recorded and indexed as mortgages by the recorder."

In *Sankey v. Howley*, 118 Pa. 30, it was held in an action of ejectment between the parties to a deed, that an unrecorded defeasance could not convert it into a mortgage. So one of the purposes of the act seems to be to protect the titles

of grantees. If this be true, could not a grantee, whose title was unencumbered, decline to avail himself of its provisions, and by tendering a reconveyance, put himself and the grantor in the position they would have been, had the provisions of the act been complied with? But if not, how can any other agreement than the one made be enforced against the bank? We certainly have no power to make a different agreement between the parties and compel it to take as payment in full that which was agreed should be collateral only. The most that can be done is to compel it to credit the value of the collateral, to which under the act it has the absolute title, upon its claim. This value could only be ascertained by the sale of the land and a reconveyance to the estate, as tendered, would effect an equitable adjustment of the matter.

The defeasance is given for the protection of the grantor, he would be entitled to its possession, and the duty would devolve upon him to have it recorded. The bank therefore should not be prejudiced in any way by Kalbfell's failure to record the defeasance, and would not be responsible for any loss A. W. Mellon may have sustained by reason of such failure.

For the bank, *A. M. & John D. Brown.*

For A. W. Mellon, *Geo. N. Chalfant.*

BOOK NOTICE.

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PITTSBURGH, PA., JANUARY 13, 1897.

Supreme Court, Penn'a.

CALDWELL et al. v. SNYDER et al.

After providing for his wife and the payment of a legacy to his son which was paid the latter, testator provided, all the rest and residue of his estate, real, personal and mixed, was to be equally divided among his children subject to deduction from their shares of specified advancements, and that the executors should sell the real estate "at any time that it may be advisable and by the agreement of my wife and a majority of my heirs; and I further will and direct that, if any of my heirs are dissatisfied * * * and resort to law, they are hereby disinherited." No sale was made by the executors pursuant to an agreement of the heirs. Held, that partition of the real estate would lie by bill in equity at the suit of one of the heirs.

Partition is of right among tenants in common except where the inherent qualities of the estate or the subject-matter prevent it.

Appeal of Florinda Caldwell and Henry Caldwell, her husband, plaintiffs, from the decree of the Court of Common Pleas of Armstrong county, in a bill in equity filed against Mary Snyder, Simon Snyder, and others, for partition.

The court sustained the demurrer generally, and dismissed the bill.

Joseph Snyder, of Armstrong county, died on the 27th day of March, 1892, leaving to survive him the plaintiff Florinda Caldwell and defendants, and by his last will, after certain provisions, gave and devised to the plaintiff Florinda Caldwell and the defendants all the rest and residue of the estate, and directed that his executors should sell any or all of his real estate "at any time that it may be advisable, and by the agreement of my wife and a majority of my heirs; and I further will and direct that, if any of my heirs are dissatisfied * * * and resort to law, they are hereby disinherited." Before the filing of the bill in this case, the personal estate of Joseph Snyder had been settled, and distribution made after the payment of debts, among the widow and legatees mentioned in the will, by proceedings and decree in the Orphans' Court. Plaintiff filed her bill in partition under the Act of July 7, 1885 (P. L. 257; 1 Purd. Dig. p. 779). Defendants demurred to the bill, setting up that the will forbade partition, and

that plaintiff had, by filing the bill, under the penalty contained in the will, forfeited her interest.

For appellant, *M. F. Leason*.
Contra, *W. D. Patton*.

Opinion by STERRETT, C. J. Filed November 9, 1896.

The rule of the civil as of the common law, that no one should be compelled to hold property in common with another, grew out of a purpose to prevent strife and disagreement: 1 Story, Eq. Jur., § 648. And additional reasons are found in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding. The early remedy was limited in its scope, but has been developed until, as has been said, practically the right of partition exists without regard to its difficulties: 1 Story, Eq. Jur., § 656; *Wiseley v. Findlay*, 15 Am. Dec. 712. Thus, in the Cold Bath Field's Case (*Warner v. Baynes*, Amb. 589). Chancellor Hardwick did not hesitate to act, notwithstanding the admitted difficulties: *Turner v. Morgan*, 8 Ves. 143. So partition is of right between tenants in common, where some have limited, and some absolute, interests (*Duke v. Hague*, 107 Pa. 57), though it involve another partition on the death of the party having a limited interest (*Poundstone v. Everly*, 31 Pa. 11). So that part of the land, on which are improvements, may be set apart to the tenant who made them: *Appeal of Kelsey*, 113 Pa. 119. So where land is incapable of equal division, it may be set apart to some, upon compensation made to others. Practically, the only limit to the right lies in the inherent qualities of the estate (as in *Hutchinson's Appeal*, 82 Pa. 509, and *Brown v. Church*, 23 Id. 495), or of the subject (*Coleman v. Coleman*, 19 Pa. 100). And this is the question involved in the present appeal. Is there anything in the quality of this land or estate which forbids partition? Certainly, so far as the land is concerned, there is not; and, leaving out of consideration the power of sale given the executors, this is an ordinary devise of land, subject to certain charges for advancements. The testator, in the first instance, provided for his wife, and the payment of a legacy to his son Simon, which appears to have been paid in his lifetime, and is therefore out of question here; "after which all the rest and residue of his estate, real and personal and mixed," was "to be equally divided between" his children, subject to deduction, from "their share," of specified advancements. *Prima facie*, this made them tenants in common, in fee, with all the incidental rights of such estate. There was no

active trust created, and no restriction on the individual right of disposition. Neither the interest of his widow nor the advancements are any obstacles to partition, for the law makes provision for the adjustment of such matters. There is therefore no occasion for the services of the executors, and no conversion. True, there is power of sale vested in executors, but that can only be called into life by the agreement of the widow and heirs. But suppose those whose advancements are largest should refuse to agree to a sale by the executors; are the others thereby excluded from all other remedy, notwithstanding the manifest intent to put them all on terms of equality? Are they put to the election of selling their individual interests at a sacrifice, or maintaining indefinitely the tenancy in common? Surely not. As there was no exclusion of the ordinary remedies, this must have been intended as cumulative. The authorities are in entire harmony with this view. Thus, it was held in *Appeal of Rawle*, 119 Pa. 100, that a direction to executors to "divide" did not exclude partition by the devisees themselves; and in *Sheridan v. Sheridan*, 136 Pa. 14, a power is given executors to sell, "if they found it necessary to do so in order to make a fair and equitable division of the estate." The case of *Baum's Appeal*, 4 Penny. 25, upon which appellees rely, is exactly the converse of the present case. There the testator directed the executor to convert, giving the beneficiaries, however, the privilege—of which they never availed themselves—of taking the land instead of the proceeds, and partition was refused because the legatees had no title in the land, while here the legal and beneficial title was given to the children, accompanied by a mere power in the executors, which can only be exercised by virtue of their agreement, and the present proceeding implies failure to agree. It is therefore clear that a right of partition exists, and the decree below must be reversed.

Decree reversed, with costs to be paid by the appellees, and record remitted to the court below, with instructions to proceed in accordance with the views expressed in this opinion.

MARSHALL v. MELLON and GALEY.

A life tenant of land, upon which no oil or gas wells had been drilled or opened before the life estate accrued, has no right to operate for oil or gas herself upon the land, and she cannot grant such a right to any one else.

And if she attempt to lease the land for the purpose of operating thereon for oil or gas, her lessee and his assignees, if they undertake to exercise such a right, are trespassers.

And as no interest in the land would be acquired under such a lease, the lessee is under no obligation to pay for a right or privilege which he never obtained, or to respond in damages for not performing an illegal covenant therein.

Petroleum and natural gas are minerals and *in situ* are part of the realty, and are obtained from the earth by a process of mining; and the established rule of law, applicable to fixed minerals, that a life tenant cannot open new mines in the land which she holds for life, also applies to operations on such land to produce petroleum and natural gas therefrom.

Appeal by Mrs. Joseph Marshall, plaintiff, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in favor of A. W. Mellon and John H. Galey, defendants, on a question of law reserved, *non obstante veredicto*. *Affirmed*.

Plaintiff's husband had devised to her for life, with remainder over, the tract of land which she, by lease dated February 17, 1885, attempted to demise, for oil or gas operating purposes, to one W. A. Mellon, who, on June 24, 1885, assigned the lease to the defendants. The lease was for the lifetime of the lessor, and contained a covenant that operations should be begun and one well completed within one year from the date of the lease, and in default thereof the lessee covenanted to pay the lessor \$175 per annum until one well should be completed.

No operations for oil or gas had ever been conducted on the land before the plaintiff's life estate had accrued, and neither the lessee nor his assignees (the defendants) ever entered on the land or undertook to operate thereon under the lease; and, after some years, the plaintiff brought this action of *assumpsit* to recover a number of the payments covenanted by the lessee to be made in default of operations.

On the trial before STOWE, P. J., several defenses not now material were raised, but the question on which the decision rests was reserved by the court, to wit, whether the plaintiff, being only a life tenant, was entitled to recover, or not, under the undisputed facts set forth above; and, subject to that question, a verdict was rendered in favor of the plaintiff for \$1,209.65. Subsequently, after argument, the court in an opinion by STOWE, P. J., (reported in 43 PITTSBURGH LEGAL JOURNAL, 290,) directed judgment to be entered for the defendants, *non obstante veredicto*, and from the judgment so entered plaintiff appealed.

For appellant, *W. H. S. Thomson, A. P. Marshall and Frank Thomson*.

Contra, Edwin S. Craig.

Opinion by GREEN, J. Filed January 4, 1897.

In *Stoughton's Appeal*, 88 Pa. 198, we said "oil however is a mineral, and being a mineral

is part of the realty: *Funk v. Haldeman*, 3 P. F. Smith, 229. In this it is like coal or any other mineral product which *in situ* forms part of the land." In *Gill v. Weston*, 110 Pa. 312, we said of petroleum, "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." In *Westmoreland Natural Gas Co. v. De Witt*, 130 Pa. 235, we said, "Gas, it is true, is a mineral, but it is a mineral with peculiar attributes." In *Blakeley v. Marshall*, 174 Pa. 425, a lease for oil and gas purposes was made by lessors who were tenants for life and also as trustee for those in remainder. The leased premises proved to be productive. A question arose upon a case stated as to the interests respectively of the life tenants and those in remainder. The life tenants claimed the whole of the oil, and for those in remainder the same claim was made. The court below appointed a trustee to receive all the oil due to the lessors, and to invest the proceeds, and pay the interest annually realized therefrom to the life tenants during their joint lives and the life of the survivor, and at the death of the latter to pay the principal to the remaindermen. This court sustained the court below and said, "As was said in *Stoughton's Appeal*, 88 Pa. 201, and other cases in the same line, oil in place is a mineral, and being a mineral is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place, in the premises, in consideration of his giving the lessors a certain per centum thereof, is in legal effect a sale of a portion of the land and the proceeds represents the respective interests of the lessors in the premises. If there be life tenants and remaindermen the former are entitled to the enjoyment of the fund (*i. e.* interest thereon) during life, and at the death of the survivor the *corpus* of the fund should go to the remaindermen." This distribution was made because all the interests concurred in making the lease, and it was to the manifest interest of all that the oil should be taken from the land lest it should be drawn away by other wells on adjacent premises. In that respect of course there is a difference between oil and gas, and solid minerals, but in respect of the interests of life tenants as contrasted with those in remainder there was no departure from the common law rule that tenants for life, only, may not open new mines or take minerals from the premises, except in case of mines opened by the former owner. This was recognized in *Westmoreland Coal Co.'s Appeal*, 85 Pa. 344, where we held that while the life tenant's right to work previously opened mines was undoubted, there was no right in a

life tenant of several tracts, to open a new mine on one of the tracts upon which no previous opening had taken place. *MERCUR, J.*, said in the opinion: "Neither tract is appendant nor appurtenant to the other. If she had a life estate in the distant tract, only, the fallacy of claiming a right to remove the coal therefrom would be most manifest. The unanswerable reason would be that the mine on that tract had never been opened."

We see no difference between the present case and those cited, so far as this question is concerned. The plaintiff was but a tenant for life of the premises in question. There had never been any oil or gas operations commenced on the land before her estate for life accrued. She had no right, therefore, to operate for oil or gas herself, and she could not give such a right to any lessee from her. Neither the original lessee nor the defendants, his assignees, ever held any such right. They would have been trespassers if they had undertaken to exercise such a right. The lease was "for the sole and only purpose of drilling and operating for petroleum oil or gas," and, "to have and to hold the said premises for the said purpose only." All the terms and conditions of the lease relate to that purpose alone, and no right to the use of the surface for any other purpose is conferred. It is manifest, therefore, that as no interest whatever was acquired under the lease, the lessees are under no obligation to pay for a right or privilege which they never obtained, or in damages for not performing an illegal covenant therein. We think the judgment entered by the court below was entirely right.

It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or nearby lands, in order to preserve the interests of both life tenants and remaindermen, it would be well for the Legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now the law is not efficacious to that end.

Judgment affirmed.

SMITH v. CITY OF NEW CASTLE.

Plaintiff's testimony was to the effect that she had passed along the west side of a street in a city several times but had not passed along the east side where there was a hole in the street which she had never seen and knew nothing of. While walking along the west side of the street on a dark night she crossed to the east side of the street and fell into the hole, which was not surrounded by barriers, and was injured. Held error to grant a compulsory nonsuit.

Appeal of Elizabeth J. Smith, plaintiff, from the judgment of the Court of Common Pleas of Lawrence county, in an action of trespass brought against the city of New Castle to recover damages alleged to have been sustained by plaintiff on account of defendant's negligence in failing to repair Jefferson street.

On the trial before WALLACE, P. J., plaintiff testified that she had been living in New Castle only about four days before the injury occurred. She had passed along Jefferson street on the west side several times, and knew there was a good pavement there. On the evening of the accident she crossed to the east side, where there was a hole, of the existence of which she had no knowledge, and into which she fell, sustaining serious injury.

The court below granted a compulsory nonsuit, on the ground that plaintiff was conclusively guilty of contributory negligence, and subsequently overruled a motion to take off the nonsuit.

For appellant, *J. Norman Martin, M. S. Anderson and D. F. Anderson.*

Contra, A. W. Gardner and D. B. & L. T. Kurtz.

Opinion by GREEN, J. Filed November 9, 1896.

There is no doubt as to the rule that where a person passing on the highway, or on any other place of passage, public or private, has a choice of two ways, one of which is safe and the other unsafe for passage, and the person about to pass voluntarily and knowingly chooses the unsafe way without any necessity for so doing, he takes upon himself the risks of the passage, and is guilty of contributory negligence: *Haven v. Bridge Co.*, 151 Pa. 620, and many other cases. In *Hill v. Tionesta Tp.*, 146 Pa. 11, we held that one who undertakes to use a public road, knowing that it is unsafe, and knowing the defects which make it so, but not choosing to avoid them, although he could do so by taking another road, cannot recover against the township for an injury resulting from such defects. But this doctrine involves necessarily the idea of knowledge of the danger on the part of the passing person. With a person having such knowledge the choice of the unsafe way is an act of negligence, and, as the negligence contributes to the injury, the person injured is incapacitated from recovering any damages for the resulting injury. And this, too, without any regard to the question whether the defendant has been guilty of negligence in maintaining the situation of danger. In the present case the plaintiff testified that she had only been living in New Castle

about four days before the accident; that she had passed along Jefferson street on the west side several times, but had not passed along on the east side, where there was a hole in the street; and that she had never seen the hole, or had any knowledge or information concerning it. The night was dark, and there were no barriers or guards to prevent persons from falling in. Shortly before reaching this place she had crossed from the west to the east side of the street, and was proceeding along the east side, towards the post office, when she fell into the hole, and was injured. There was an abundance of testimony to prove the existence of the defect in the street, and, if the jury believed the witness, she had no knowledge of the defect when she fell in. The learned court below granted a compulsory nonsuit, thus taking the case away from the jury, on the ground that the plaintiff was conclusively guilty of contributory negligence. That this would have been so if she had voluntarily and knowingly left the west side of the street, which she knew to be safe, and gone to the east side, which she knew to be unsafe, cannot be doubted. But, if she knew nothing about the unsafe condition of the east side, the element which would convict her of contributory negligence is entirely lacking, and the ruling would be incorrect. She had a right to presume that the east side of the street would be in a safe condition for travel; and, if she had no actual knowledge or notice of its unsafe condition, she was certainly not chargeable with negligence, as a matter of law, in going to that side. The learned court below, in granting the nonsuit, acted upon the authority of the case of *Railroad Co. v. Cadow*, 120 Pa. 559, assuming that it controlled the question in this case. But the facts in that case were of an entirely different character from the facts in this, and presented a radically different aspect of the question. There the highway along which the plaintiff was passing was crossed by two tracks of the defendant's railroad, which was a visible and lawful construction. The plaintiff was in the daily habit of crossing the railway tracks on the highway, and had a perfect knowledge of the whole situation. The sidewalks on both sides of the street where the tracks crossed them were in good and safe condition, and in constant use. The plaintiff, on a dark morning, left the sidewalk, and undertook to cross the rails in a diagonal direction, and in doing so he caught his foot in one of the rails, stumbled and fell, breaking one of his legs. We held him guilty of contributory negligence, because he voluntarily left the safe sidewalk, and crossed at a place where he knew there was an obstruc-

tion. While he might not have known that the rails were not ballasted up even with the street at the ends of the plank crossing in the street, yet he knew of the presence of the rails across the street, and necessarily assumed the risks of crossing that kind of an obstruction. But in the present case the defect in the street was, by its very nature, not a lawful condition of the street, and was not only not known to the plaintiff, but she had no reason to apprehend the presence of any obstruction, or any defect of any kind. She cannot be said, therefore, to have been conclusively guilty of contributory negligence in crossing the street and using the other side for passage. But that question, together with the negligence on the part of the defendant, would have to be determined by the jury. In its facts the case is somewhat analogous to the case of *Douglass v. Water Co.*, 172 Pa. 435. We therefore sustain the assignments of error, and send the case to another trial.

Judgment reversed and new venire awarded.

MARTIN'S ESTATE.

Appeal of E. M. SAYERS.

Testatrix devised as follows: "Third, I give and bequeath to my grandson, A. M. Vale, \$1,000, to be and remain in the farm whereon I reside, to be paid to him personally when he shall come for it, but should he never come for it then I direct it to be divided among my other legatees equally hereafter mentioned." Before the making of testatrix's will, A. M. Vale had gone to the western part of the United States and had not been heard from, and it was common report that he was dead. Within five months after testatrix's death he came East, made demand upon the administrator *c. t. a.*, and the daughter, to whom the land was to go, neither of whom could pay the legacy, assigned it for value to the appellant and in a few weeks returned to the West. Held, that the legatee need not personally come at the time of distribution of the estate to demand the legacy, that further the assignment was valid and that the appellant, the assignee of the legacy, was entitled to it out of the distribution of the estate.

Appeal of E. M. Sayers, from the decree of the Orphans' Court of Greene county, confirming report of auditor appointed to make distribution of the proceeds of the sale of realty belonging to the estate of Ruth Martin, deceased.

The facts are fully stated in the opinion of the Supreme Court, *infra*.

For appellant, *James E. Sayers*.

Contra, *A. A. Purman*.

Opinion by FELL, J. Filed November 11, 1896.

The controversy in this case grows out of the following clause of the will of Ruth Martin: "Third, I give and bequeath to my grandson, A. M. Vale, \$1,000, to be and remain in the farm whereon I reside, to be paid to him personally

when he shall come for it, but should he never come for it then I direct it to be divided among my other legatees equally hereafter mentioned." In the same clause the testatrix directed that her daughter, Mary Riggle, should take the farm on which the legacy was charged at a valuation to be fixed by an appraisement, but provided that if it was not taken by her it should be sold and the proceeds divided among a number of legatees. Her daughter declined to take the farm, and it was sold under proceedings in the Orphans' Court. Several years before the date of the will A. M. Vale removed to the West, and there was a report in the neighborhood in which he had lived in this State that he was dead. The testatrix, his grandmother, had heard this report, and at the time of the execution of the will she was in doubt whether he was living. She died in October, 1881, two years after the date of her will. In February, 1882, A. M. Vale, having heard of the provisions of the will, came from California to Pennsylvania, for the purpose of collecting the legacy. He demanded payment of Mary Riggle, on whose land if she took the farm the legacy was made a charge, and of the administrator *c. t. a.* of the estate. Neither of these parties at the time was in possession of funds with which to pay him. After remaining here a few weeks he sold and assigned the legacy to E. M. Sayers, the appellant, and returned to his home in California, and has not since been in this State. It does not appear when Mary Riggle finally refused to take the farm at the valuation fixed. An appraisement was made, and negotiations between the parties were pending for some time; and upon their failure to agree proceedings to effect a sale were commenced in June, 1885. Notice of these proceedings was served upon the appellant as assignee of Vale.

Upon these facts the learned auditor found as matter of law that the legacy was not assignable, as it was contingent and the condition upon which it would vest had not been performed; that the demand made by Vale was insufficient, and that he must now come personally for the legacy to the party authorized to pay from the proceeds of the sale of the farm, and he directed that the amount of the legacy should be set apart to be paid to Vale and that in the event of his not coming and receiving it personally within six months from the confirmation of the auditor's report the sum set apart should be distributed to the other legatees. His report, except the requirement as to the time within which Vale should appear and make demand, was confirmed by the court.

This finding cannot be sustained. The case

is not governed by *Stover's Appeal*, 77 Pa. 282. The difference in the wills is sufficient to indicate different intentions on the part of the testators, and in *Stover's Appeal* no demand had been made for the annuity. It is unnecessary to consider whether the legatee had a vested interest in the legacy at the death of Mrs. Martin, as we think that the conditions upon which the legacy became payable were complied with by him. The evident intention of the testatrix was that her grandson, if living, should receive \$1,000 of her estate. She had reason to suppose that he was dead, or that if living, he might never return to receive her gift. She gave effect to her intention by providing that the legacy should be a charge upon the land which she desired her daughter to take and to be paid to her grandson if he came for it, and by a bequest over if it should be unclaimed by him. He came within five months of her death and claimed the legacy. This claim was made to the administrator and to the daughter to whom the land was to go. These were the proper persons of whom to make demand. They were unprepared to pay. No duty rested upon the legatee to wait indefinitely or to cross the continent again to make demand at the particular time when in the course of the administration the fund was ready for distribution. He did all that he was required to do and all that it was intended that he should do. He came and demanded the legacy. His right to it then, if not before, was fixed, and he could deal with it as he pleased. It follows that the assignment by Vale was valid, and that the appellant is entitled to the amount of the legacy with interest from October 12, 1882. We see no reason why any part of the expenses of the audit should be deducted from the legacy. The appellant has not been in fault in asserting what we regard as a just demand, and the whole expense of the audit should be paid from the general fund.

The order of the court of December 31, 1895, is reversed and set aside, and the record is remitted in order that distribution may be made in accordance with this opinion.

Court of Common Pleas No. 2.

J. B. SHERIFF MANUFACTURING COMPANY v. THE PRITSCH COAL COMPANY.

In 1894 the plaintiff entered suit against certain persons as a partnership and the writ is served on one of them. An attorney at the request of this one enters a general appearance and judgment is rendered against all the partners. Two years later A. asks to open the judgment on the ground that he was not a partner,

had not authorized an appearance for him and had now just learned of the suit. *Held*, that the judgment should be opened as to him and he be allowed to defend on the single issue as to whether he was a member of the partnership.

Where an attorney enters his appearance for a party without authority the act is not conclusively binding on the party.

No. 251 July T., 1894. Petition to open judgment as to Philip Pritsch.

Opinion by EWING, P. J. Filed January 13, 1897.

This suit was brought May 1, 1894, against John W. Harpham, John W. Kimerling, Jacob Kinimel, Philip Kimmel, George E. Meoser, *Jacob Pritsch* and Percy F. Smith, partners doing business as "The Pritsch Coal Company."

The sheriff returned, "Served May 2, 1894, by delivering a true and attested copy of this writ to J. W. Kimerling, president of The Pritsch Coal Company, and making known to him the contents thereof."

On the 16th of May, 1894, John W. Kimerling made affidavit of defense for himself "and as agent, on behalf of all the members of said partnership," as well as for the Pritsch Coal Company." There is no suggestion in the affidavit that Jacob Pritsch is not a member of the firm, though his name is not mentioned. At the request of Kimerling, Geo. C. Wilson, Esq., entered a general appearance for defendants. The case was tried by jury and verdict for over \$1200 was rendered for plaintiffs, and on June 18, 1895, judgment was entered on the verdict.

On September 2, 1895, plaintiffs presented to the court a petition setting forth the judgment, that an exemplification of record had been filed in Common Pleas of Cambria county; that they had discovered that a mistake had been made in the christian name of one of the defendants, that it should have been *Philip* Pritsch instead of *Jacob* Pritsch, as it was in the papers in the case, and asking for an amendment accordingly. And thereupon a rule was granted on defendants to show cause why the record should not be amended accordingly. This rule was served on Geo. C. Wilson, attorney for defendants, who as such accepted service; and the rule was made absolute in default of an answer.

All this time Mr. Wilson had neither seen nor communicated with Philip Pritsch or Jacob Pritsch, but had in good faith entered his appearance and defended on the authority of Mr. Kimerling. Philip Pritsch denies that he ever heard of his being sued, or it being claimed in a suit that he was a partner, until long after this time, and the other evidence corroborates him, or that he authorized an appearance or defense to be entered for him. Mr. Wilson's

testimony has not been taken on rule and reduced to writing, but he made his statement in open court.

There is no evidence to indicate that Pritsch heard of himself being in this suit until August, 1895, and he says not then.

On May 13, 1896, Philip Pritsch presented his petition asking to have this judgment opened as to him, alleging that he had no notice of the suit (he lives in Cambria county), that he never gave any one authority to appear for him, or to make defense for him; that he never was a partner in the defendant firm, and denying all liability on the contract.

A rule to show cause was granted; testimony has been taken on both sides. The testimony is satisfactory that Pritsch never was informed of this suit until long after judgment obtained, and after change in the record. It is in fair *equilibria* as to whether or not he was a partner. It will be a question for the jury on a trial.

If the amendment of record changing the name from Jacob to Philip Pritsch be an error, the remedy is in an appeal to the Supreme Court.

If the court has power to grant a new trial at this late day it should do so.

Where there has been a service of summons on the defendant, or an authorized appearance, and judgment has been obtained on a hearing in a regular way or on a jury trial, the court has power to open this judgment during the term at which it was entered, *but not thereafter*. The rule is different where judgment has been entered in default of appearance or on a judgment note: *King v. Brooks*, 72 Pa. 363; *Hill v. Egan*, 2 Super. Ct. Rep. 596.

The old rule was generally held to be that where an attorney entered an appearance for a party (not served) without authority and judgment was obtained thereby, the court would not open the judgment but leave the party aggrieved to his remedy against the attorney.

The case of *Hatch v. Stitt*, 66 Pa. 284, is to this effect, and the opinion in the case by READ, J., goes to an extreme in holding this doctrine. That case might have been decided in the same way on another ground. THOMPSON, C. J., and AGNEW, J., dissented. The later case of *Bryn Mawr National Bank v. James*, 154 Pa. 364, decides the reverse and affirms the court below in striking off a judgment entered on acceptance of service and appearance by an attorney not authorized thereto.

In the recent work of "Weeks on Attorneys," p. 408, it is said, "The practice of the English courts now seems to be to consider the act of

an attorney not conclusively binding, unless he is employed by the person for whom he appears, and the decisions of the courts of the United States have generally been in accord with that practice. Especially will the party be relieved and the proceedings set aside and stayed when it appears the attorney is insolvent."

In the present case the attorney is solvent and reliable in every way; nobody doubts his good faith, and it seems to us that under the circumstances of this case he is entitled to some consideration, and that he should not be unnecessarily subjected to the risks of a suit. No harm has been done the plaintiff.

In this division of the authorities, and with the latter rulings being in favor of the petitioner, we will follow the rule that seems to us to be the just, equitable and reasonable one in this case, and open the judgment to let Philip Pritsch into a defense.

The petitioner did not act as promptly as he might have done, but he appears to be a man of little knowledge of business affairs, and this should have its weight in this application.

The main question of liability of the firm has been decided in favor of the plaintiff in a well contested trial. The only question left is, was Philip Pritsch a member of the defendant firm and liable as such? and to this question the issue will be confined.

ORDER OF COURT.

And now, 13th January, 1897, after hearing on petition, answer and testimony, and arguments of counsel, the judgment in this case is opened as to Philip Pritsch and he allowed to defend on the single issue, to wit, as to whether or not he was a member of the firm defendant, doing business as "The Pritsch Coal Company," and as such liable on its contract in this case; and further, it is ordered that the case be placed at the foot of the present trial list.

Per Curiam.

For plaintiff, *Jenniags & Wasson*.

For petitioner, *Lyon, McKee & Sanderson*.

Circuit Court, United States,

Western District of Pennsylvania.

PIERCE et al. v. CORRIGAN, McKINNEY & CO.

Whereupon the removal of a cause from a State court the record is not filed within the time fixed by statute, it is, nevertheless, within the sound legal discretion of the Circuit Court to retain jurisdiction of the cause, and this will be done where the failure was due to the mistake of counsel arising out of the fact that the court sits at fixed times at several different places in the dis-

trict and the trial of the case has not been delayed by such failure.

No. 2 May T., 1897. *Sur* rule to show cause why this case should not be remanded to the State court.

Opinion by *ACHESON*, Cir. J. Filed December 28, 1896.

The ground upon which the court is asked to remand this case is the defendants' failure to file a copy of the record on or before the first day of the session of the court next after July 21, 1896, the date of the order of the State court that it proceed no further, etc. The first succeeding term was that at Scranton, beginning the first Monday of September, the second was that at Williamsport, beginning the third Monday of September, the third was that at Pittsburgh, beginning the second Monday of November, 1896, and the fourth term that at Erie, beginning the second Monday of January, 1897. A copy of the record was filed at Erie immediately after the granting of this rule on November 19, 1896. In their answer to the rule the defendants set up that they were advised by their counsel that there were divisions of the Western District of Pennsylvania, and that they had the right to take their removal to such division as was most convenient to them for trial; that Erie was the most convenient place, and they were advised that they had until the second Monday of January to file the copy of the record there. I am convinced of the truth of these allegations and also of the entire good faith of the defendants. The statements of the defendants' counsel satisfy me that the delay in filing the record was altogether in consequence of their supposition that this judicial district was cut up into divisions and that the practice here was the same as that which prevails in the Northern District of Ohio, where the defendants and their home counsel reside. The delay in filing a copy of the record has not caused any delay in the trial. Now, influenced by these considerations, I am indisposed to remand the cause. It is settled that where a copy of the record is filed out of time it is within the sound legal discretion of the Circuit Court to proceed as if it had been filed within the time prescribed by the statute. *St. Paul & Chicago Railway Co. v. McLean*, 108 U. S. 212, 216. There the Supreme Court said: "These cases abundantly sustain the proposition that the failure to file a copy of the record on or before the first day of the succeeding session of the Federal court does not deprive that court of jurisdiction to proceed in the action, and that whether it should do so or not upon the filing of such copy is for it to

determine." In *Lucker v. Phoenix Assurance Co.*, 66 Fed. Rep. 161, a case somewhat like this one, Judge SIMONTON accepted the explanation of counsel as to their misapprehension with respect to the place and time of filing a copy of the record as a sufficient excuse for default, and retained jurisdiction of the case on terms. This precedent I will follow.

And now, December 28, 1896, the motion to remand is denied, upon the terms that the defendants file an answer or counter-statement to the plaintiffs' declaration or statement of claim and put in a plea within thirty days from this date, and that the trial of the case shall take place at Pittsburgh at the next (May) term if the plaintiffs shall so elect and move the court for an order to that effect on or before the first Monday of February, 1897. *Per Curiam*.

For plaintiffs, *A. M. Imbrie*.

For defendants, *J. E. Ingersoll and Thomas Tanner*.

SUPREME COURT OF PENNSYLVANIA.

Sitting in the Eastern District.

The following orders and judgments were filed at Philadelphia on Monday, January 4, 1897:

PER CURIAM:

First National Bank of Omaha v. Crosby. C. P. of Armstrong Co. Judgment affirmed.

Poterle Gas Co. v. Poterle. C. P. of Armstrong Co. Decree affirmed.

Odd Fellows' Savings Bank v. Miller. C. P. No. 1, of Allegheny Co. Judgment affirmed.

Welxel v. Lennox. C. P. No. 1, of Allegheny Co. Appeal dismissed, but without prejudice, etc., at appellant's costs.

Welxel & Co. v. Lennox. C. P. No. 1, of Allegheny Co. Decree affirmed and appeal dismissed at appellant's costs.

Ackman et ux. v. Jaster et ux. C. P. No. 2, of Allegheny Co. Judgment affirmed.

Dillon v. Allegheny County Light Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Davis, to use, v. Huggins. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Gallagher et al. v. Davis. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Roger's Estate—Flannery's Appeal. O. C. of Allegheny Co. Decree affirmed.

Roger's Estate—Jackson's Appeal. O. C. of Allegheny Co. Decree affirmed.

Foster's Estate—Gillmore's Appeal. O. C. of Allegheny Co. Decree affirmed.

Luebke's Estate—German Protestant Orphans' Home's Appeal. O. C. of Allegheny Co. Decree affirmed.

Jones' Estate—Pantall's Appeal. O. C. of Jefferson Co. 130 Oct., 1896. Decree affirmed.

Jones' Estate—Pantall's Appeal. O. C. of Jefferson Co. 131 Oct., 1896. Decree affirmed.

White v. Wright et al. C. P. of Mercer Co. Decree affirmed.

Duff & Sons v. Peoria Grape Sugar Co. Reargument refused.

Clark et al. v. Pittsburgh Natural Gas Co. et al. Rule discharged and petition dismissed at petitioner's costs.

Penn v. Dickey et al. C. P. of Jefferson Co. Rule discharged and petition dismissed at petitioner's costs.

Clements et ux. v. Philadelphia Company. C. P. No. 2, of Allegheny Co. Appeal from judgment of Superior Court allowed.

By STERRETT, C. J.:

County of Allegheny v. Grier. C. P. No. 1, of Allegheny Co. Judgment affirmed. MITCHELL, J., dissents. Munn, Moon & Co. v. Wakefield, Trustees, et al. C. P. No. 1, of Allegheny Co. Decree affirmed.

Allison et al. v. Powers. C. P. No. 1, of Allegheny Co. Decree affirmed.

Taylor v. Sattler. C. P. No. 2, of Allegheny Co. Judgment affirmed.

McCallum et al. v. Morris et al. C. P. No. 2, of Allegheny Co. Judgment reversed.

Lenkner v. Citizens' Traction Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Tuefel, to use, v. Rowan. C. P. No. 3, of Allegheny Co. Decree affirmed.

Rowan v. Rowan. C. P. No. 3, of Allegheny Co. Decree affirmed.

Slicker v. Schuckert. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Goorin v. Pittsburgh & Birmingham Traction Co. and The Allegheny Traction Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Packer et al. v. Packer et al. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Henderson v. Allegheny Heating Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Balph et al. (partners as Columbia Fire Proofing Co.) v. Liberty National Bank. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Friend v. Oil Well Supply Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Appeal of Chalfant et al., Trustees. O. C. of Allegheny Co. Decree affirmed.

Morris et al. v. Stevens. C. P. of Blair Co. Appeal dismissed, ordered that the record be remitted to the court below for further proceedings.

Fritz et al. v. Menges. C. P. of Somerset Co. Judgment affirmed.

McMahon v. The Sewickley Mutual Fire Insurance Co. C. P. of Westmoreland Co. Judgment reversed and a venire facias de novo awarded.

By GREEN, J.:

City of Philadelphia v. Union Burial Ground Society, for the City and County of Philadelphia. C. P. No. 1, of Philadelphia Co. Judgment affirmed. WILLIAMS, J., dissenting opinion.

Thompson v. Sproul & Co. C. P. No. 1, of Allegheny Co. Judgment affirmed.

Shrader v. United States Glass Co. C. P. No. 1, of Allegheny Co. Judgment reversed and venire de novo awarded.

Stringert v. Ross Township. C. P. No. 1, of Allegheny Co. Judgment affirmed. STERRETT, C. J., McCOLLUM and MITCHELL, JJ., dissent.

Neale et al. v. Dempster. C. P. No. 1, of Allegheny Co. Judgment reversed.

Marshall v. Mellon & Galey. C. P. No. 1, of Allegheny Co. Judgment affirmed.

Murphy & Hamilton v. Liberty National Bank. C. P. No. 1, of Allegheny Co. Judgment reversed and proceeding awarded.

Schlehl's Estate—Schlehl's Appeal. O. C. of Allegheny Co. Decree reversed.

Wall v. Royal Society of Good Fellows. C. P. No. 3, of Allegheny Co. Judgment reversed and new venire awarded.

Riddle, Executor, v. Armstrong. C. P. of Butler Co. Judgment affirmed.

Earley v. The Hummelstown M. F. Ins. Co. C. P. of Dauphin Co. Judgment affirmed. MITCHELL and FELT, JJ., dissent.

Lineberger v. Newkirk et al. C. P. of Mercer Co. Judgment affirmed.

Sprowles v. Morris Township. C. P. of Washington Co. Judgment affirmed.

Dickson v. Hartman Manufacturing Co. C. P. No. 3, of Allegheny Co. Judgment reversed.

By WILLIAMS, J.:

Philadelphia v. The Union Burial Ground Society. C. P. No. 1, of Philadelphia Co. Dissenting opinion.

Smith v. Reimer. C. P. No. 2, of Allegheny Co. Judgment affirmed.

Toohey v. Equitable Gas Co. C. P. No. 2, of Allegheny Co. Judgment reversed.

Pennsylvania Railroad Co. v. Turtle Creek Electric Railway Co. et al. C. P. No. 3, of Allegheny Co. Appeal affirmed.

Gaertner v. Heyl et al. C. P. No. 3, of Allegheny Co. Judgment reversed and a venire de novo awarded.

Douglass Furnace Co. v. Oil Well Supply Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Brymer et al. v. Butler Water Co. C. P. of Butler Co. Modified and reversed.

Philson v. Mutual Life Ins. Co. of New York. C. P. of Somerset Co. Judgment reversed and venire facias de novo awarded.

Davidson v. Lake Shore & Michigan Southern Ry. Co. C. P. of Venango Co. Judgment affirmed.

Braunschweiler v. Waits. C. P. of Venango Co. Judgment reversed and a venire facias de novo awarded.

Beringer v. Lutz et al. C. P. of Venango Co. Judgment reversed and a venire facias de novo awarded.

Taylor's Estate—Birch et al.'s Appeal. O. C. of Washington Co. Judgment affirmed.

By McCOLLUM, J.:

Borough of Tyrone v. Stevens et al. C. P. of Blair Co. Decree affirmed.

Blair's Estate—Bellefonte Furnace Co.'s Petition. O. C. of Centre Co. Decree reversed, and record remitted with direction to enter a decree in accordance with this opinion. The costs of this appeal to be equally divided between the parties.

Rathgebe v. The Pennsylvania R. R. Co. C. P. of Westmoreland Co. Judgment affirmed.

Powell et al., Administrators, v. Derrickson et al., Executors. C. P. of Crawford Co. Judgment affirmed.

Platz v. McKean Township. C. P. of Erie Co. Judgment affirmed.

Clayton Electric Co. v. McKeesport & Wilmerding Railway Co. C. P. No. 2, of Allegheny Co. Judgment reversed and venire facias de novo awarded.

Chaffey v. Boggs. C. P. No. 3, of Allegheny Co. 24 Oct., 1896. Judgment reversed and proceeding awarded.

Chaffey v. Boggs. C. P. No. 3, of Allegheny Co. 184 Oct., 1896. Judgment reversed and proceeding awarded.

Yost v. McKee et al. and Dwelling House Insurance Co. C. P. No. 3, of Allegheny Co. 89 Oct., 1896. Judgment affirmed.

Sands v. McKee et al. Dwelling House Ins. Co. C. P. No. 3, of Allegheny Co. 90 Oct., 1896. Judgment affirmed.

Wheery, for use, v. Wheery, Administratrix. C. P. of Armstrong Co. Judgment reversed and the præcipe and all proceedings thereunder are set aside.

Reagle et al. v. Reagle. C. P. of Mercer Co. Judgment affirmed.

Danley v. Danley, Executors. C. P. of Washington Co. Judgment affirmed.

By MITCHELL, J.:

Miller's Estate—Miller's Appeal. Dissenting opinion. FELL, J., concurs.

Cleary v. Pittsburgh, Allegheny & Manchester Ry. Co. C. P. No. 1, of Allegheny Co. Judgment affirmed.

Hazle v. Beilstein. C. P. No. 1, of Allegheny Co. Decree affirmed.

Keating v. McAdoo. C. P. No. 1, of Allegheny Co. Judgment affirmed.

City of Allegheny v. Pittsburgh, Allegheny & Manchester Ry. Co. C. P. No. 2, of Allegheny Co. Judgment affirmed.

City of Allegheny v. Federal St. & P. V. Pass. Ry. Co. C. P. No. 2, of Allegheny Co. Judgment affirmed.

Auberle v. McKeesport. C. P. No. 2, of Allegheny Co. Judgment reversed.

Straw et al. v. Murphy et al. C. P. No. 2, of Allegheny Co. Decree reversed, rule made absolute, and the Bank of Secured Savings is directed to pay the fund in controversy, less any proper charges and deduction to appellant, Harry J. Smith, or his assigns.

Hays v. Hays. C. P. No. 3, of Allegheny Co. Decree reversed and bill dismissed with costs. STERRETT, C. J., dissents.

Wallace v. Jameson et al. C. P. of Lawrence Co. Judgment affirmed.

Wallace v. Jameson et al. C. P. of Lawrence Co. Certiorari quashed.

Bartley et al., trading as Farmers' Oil Co., v. Phillips. C. P. of Butler Co. Judgment affirmed.

Cookson v. Pittsburgh & Western Ry. Co. C. P. of Butler Co. Judgment affirmed.

Smith's Estate. Stevenson's Appeal. O. C. of Washington Co. Modified and affirmed.

Smith v. Times Publishing Co. et al. C. P. No. 3, of Philadelphia Co. Judgment reversed and a venire facias de novo awarded. STERRETT, C. J., and WILLIAMS, J., concurring opinions, in which GREEN, J., concurs. DEAN, J., dissenting opinion, but concurs with the reversal of the judgment.

By DEAN, J.:

In re Sewer on Beechwood Avenue—Pittsburgh's Appeal—In re Hoevler. C. P. No. 1, of Allegheny Co. Decree affirmed.

In re Sewer on Beechwood Avenue—Pittsburgh's Appeal. No. 91. C. P. No. 1, of Allegheny Co. Decree affirmed.

In re Sewer on Beechwood Avenue—Pittsburgh's Appeal—In re East End Gas Co. C. P. No. 1, of Allegheny Co. Decree affirmed.

In re Sewer on Beechwood Avenue—Pittsburgh's Appeal—In re King. C. P. No. 1, of Allegheny Co. Decree affirmed.

In re Sewer on Beechwood Avenue—Pittsburgh's Appeal—In re Leech. C. P. No. 1, of Allegheny Co. Decree affirmed.

McGowan v. Bailey, Wilson & Co. Appeal of plaintiff. C. P. No. 1, of Allegheny Co. Decree affirmed, with the modifications that interest on the \$1,900, amount due, shall be paid from July 1, 1890, to date of this decree.

McGowan v. Bailey, Wilson & Co.—Appeal of Defendant. C. P. No. 1, of Allegheny Co. Appeal dismissed.

Riverton Ferry Co. v. McKeesport & Duquesne Bridge Co. C. P. No. 2, of Allegheny Co. (From Superior Court.) Decree reversed and case referred back to the Master for settlement of damages, etc.

Hamilton v. Marshall. C. P. No. 2, of Allegheny Co. Decree affirmed.

Burk v. Howley et al. C. P. No. 2, of Allegheny Co. Judgment affirmed.

City of Pittsburgh v. Maxwell. C. P. No. 3, of Allegheny Co. Decree affirmed and appeal dismissed.

Seeley v. Citizens' Traction Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Stepp v. Frampton. C. P. No. 3, of Allegheny Co. Decree affirmed and appeal dismissed.

Miller's Estate—Miller's Appeal. O. C. of Allegheny Co. Decree reversed, and ordered that an issue be awarded to determine whether the alleged will and codicils were procured by the undue influence of Florence C. Miller.

In re School Directors of Kittanning Township. C. P. of Armstrong Co. Decree affirmed and appeal dismissed.

Morris et al. v. Stevens et al. C. P. of Blair Co. Dissenting opinion.

In re School Directors of Washington Township—Ross et al.'s Appeal. C. P. of Greene Co. Decree affirmed.

Francis et ux. v. Franklin Township. C. P. of Butler Co. Judgment reversed.

In re Rule on Cornelius Smith, Esq. C. P. of Lackawana Co. Decree affirmed and appeal dismissed.

Zahn et al. McMillin et al. C. P. of Lawrence Co. Decree reversed, and plaintiff's bill reinstated, etc.

Mathews v. The Peoples Natural Gas Co. C. P. of Washington Co. Judgment affirmed.

By FELL, J.:

Voigt v. Fisher. C. P. No. 1, of Allegheny Co. Judgment affirmed.

Voigt v. Wallace. C. P. No. 1, of Allegheny Co. Judgment affirmed.

Boehm v. Gloekner. C. P. No. 1, of Allegheny Co. Judgment reversed.

Kurawski v. Schneider. C. P. No. 2, of Allegheny Co. Judgment affirmed.

Reber v. Pittsburgh & Birmingham Traction Co. C. P. No. 2, of Allegheny Co. Judgment affirmed.

American Casualty Insurance & Security Company, to use, v. Arrott. C. P. No. 3, of Allegheny Co. Judgment affirmed.

In re Petition of City of Pittsburgh, etc.—Mead et al.'s Appeal. 35, 36, 37, Oct., 1896. C. P. No. 3, of Allegheny Co. Decree in each case affirmed.

In re Petition of the City of Pittsburgh—Smith's Appeal. C. P. No. 3, of Allegheny Co. Decree affirmed.

In re Amberson Avenue—Child's Appeal. C. P. No. 3, of Allegheny Co. Decree affirmed.

O'Toole v. Post Printing & Publishing Co. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Nelmeier v. Riter & Conley. C. P. No. 3, of Allegheny Co. Judgment affirmed.

Jackson's Estate—Jackson's Appeal. O. C. of Beaver Co. Order affirmed.

Commonwealth ex rel. Hensel, Atty. Gen., v. The Provident Bicycle Association. C. P. of Dauphin Co. Judgment affirmed.

Smith v. Wachob & Hine—Hine's Appeal. C. P. of Indiana Co. Judgment affirmed.

Smith v. Hine. C. P. of Indiana Co. Judgment is reversed, with a venire facias de novo.

Meyers' Estate—Meyers et al.'s Appeal. O. C. of Somerset Co. Decree affirmed.

Meyers' Estate—Meyers' Appeal. O. C. of Somerset Co. Decree affirmed at the cost of appellee.

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Editor.

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O.S., Vol. XLIV. }

No. 26.

PITTSBURGH, PA., JANUARY 20, 1897.

Supreme Court, Penn'a.

MILLER'S ESTATE.

Appeal of ALEXANDER H. MILLER.

An issue *devisavit vel non*, on the ground of testamentary incapacity, is properly refused where it appears from the undisputed facts that the testator was an aged man worth \$300,000, and has six children; that he gives more than three-fourths of his estate to one of them; that for ten years before his death, including the period covering the date of the will, he drank largely of intoxicating liquors, besides was sorely afflicted with an incurable disease, while the disputed facts show that he was in an almost constant state of intoxication, and interested witnesses testify that in consequence of the use of intoxicating liquor his memory had failed and his power of will weakened.

An issue should be granted to determine the question of undue influence where it appears from the testimony of nine or more witnesses interested and disinterested, that the chief beneficiary under the testator's will, lived in the house with his father, was his confidant for years, close to his person and his adviser in his business, all of which tended to show the extent of the influence obtained by the chief beneficiary over his father from a time antedating the will until his death, though the testimony of many reputable witnesses tended to show that the testator at times was not incapacitated from making a valid testament.

MITCHELL and FELL, JJ., dissent.

Appeal of Alexander H. Miller from the decree of the Orphans' Court of Allegheny county, dismissing his petition for an appeal from the Register of Wills admitting to probate the alleged will and codicils thereto of Alexander H. Miller, deceased, and praying for an issue *devisavit vel non*.

The facts sufficiently appear in the opinion of the Supreme Court, *infra*.

For appellant, *Edward Campbell, Lazear & Orr, W. H. Tomlinson and Charles E. Hogg.*

Contra, Clarence Burtleigh and Watson & McCleave.

Opinion by DEAN, J. Filed January 4, 1896.

Alexander H. Miller, a member of the bar of Allegheny county, on 4th September, 1887, died at the age of 73 years; his wife had died seven years before, but he left surviving him six children, Alexander H., this appellant, with four brothers and a daughter, Virginia, married to Patrick H. Winston. He left a will, dated

24th May, 1888, to which were appended two codicils, one dated 29th May, 1884, and the other 20th July, 1886. His estate, made up of realty and personalty, was valued at between three and four hundred thousand dollars.

By the will, he gave to his executors in trust for his daughter Virginia, \$25,000; to his son Zant, \$5,000; to his son Hampton, an annuity of \$500 for life; to Thomas, \$5,000; to his brother George W., an annuity for life of \$200. All the residue he gave absolutely to his son Florence, and appointed him and James J. Donnell executors of the will.

By the first codicil, he adds \$5,000 to the bequest to his son Thomas, making it \$10,000; to his son Alexander H., who had been giving nothing in the will, he gave an annuity for life of \$400. By the second codicil, he gave to his son Hampton, in addition to his annuity, a house and lot then in the son's occupancy, and increased Alexander's annuity from \$400 to \$500.

The result of the will and codicils was to leave full three-fourths of the estate to his son Florence. The will was proven 10th September, 1887, without notice to the heirs or legatees. An appeal was taken by Hampton J. Miller from the decree admitting the will to probate, which was dismissed because of neglect of appellant to file the bond required by law. On 27th June, 1892, Alexander H. Miller, this appellant, presented his petition to the Orphans' Court for allowance of an appeal from same decree. In this petition, he averred, testamentary incapacity of his father at the date of the execution of the will and codicils, and undue influence exercised over him by Florence C. Miller, the principal beneficiary, to procure the making of them. It is not important, in the issue before us, to notice and discuss the decrees on this petition in the court below, in the interval between probate and dismissal of petition. They afford us no aid in the decision of this contention. It is sufficient to say, the appellant got his case properly before the court below, and that there was a regular judicial decree on the merits, after hearing by a court of competent jurisdiction, against him, from which he now appeals to this court.

He alleges the court erred, *first*, in not determining there was evidence for a jury that the testator lacked testamentary capacity at the date of the will and codicils; and *second*, in not finding there was evidence for a jury that the will was procured by undue influence exercised over him by Florence C. Miller.

When the question before an appellate court is, whether the evidence adduced in the court below was of that character which required its

submission to a jury, and the answer of the appellate court is in the affirmative, a sort of restraint in the expression of an opinion, is always necessarily imposed on the appellate court; not because of doubt in the correctness of its judgment, but because of the possible effect of elaborate discussion on the retrial of the cause. Hence, in whatever we may say in vindication of this judgment we desire it to be distinctly understood we are not pointing out what the verdict of the jury ought to be, but only the evidence on which a jury, after a consideration of it, may rest a verdict if in view of all the evidence such verdict be warranted.

The appellant averred the testator lacked testamentary capacity when he executed the will and codicils. The court below, as a question of fact, determined this averment was so unfounded, that there was no evidence which would warrant a jury in sustaining it, but that, on the contrary, he possessed "testamentary capacity of the highest order."

It was alleged the testator had become so addicted to the use of intoxicating liquor years before the date of the will, and at that date the habit was so aggravated and confirmed that his mental powers were weakened, and bordered on imbecility. In proof of this, twenty witnesses were called, some of whom had peculiar and long-continued opportunities of observation, who testified, that he began the drink habit about the year 1865, and kept it up until after the date of the will and codicils, and until his death. It had so grown upon him, as early as 1879, that he drank at times as much as a quart a day, and that it might be easy of access, he kept it in large quantities, both at his house and law office, he bought whiskey for his own use on more than one occasion by the barrel. One of the witnesses to the excessive use of liquor was W. A. Lewis, Esq., who commenced reading law with him in 1865, and continued in his office until 1882; some of the others were servants in his family, others street car conductors on the lines leading past his home. Besides these disinterested witnesses, were some of his children living much of the time in his house. That he drank liquor to gross excess from 1879 to his death, cannot be questioned from this testimony, unless almost every one of the twenty witnesses be guilty of flat perjury. If they are believed, then his brain was saturated with alcohol for almost ten years before his death.

But further than this, it was averred and not denied, the testator, when he executed the will and codicils, was afflicted with locomotor ataxia. This, appellant alleged, contributed to his physi-

cal and mental prostration. As to the probable effects of alcoholism and the disease, locomotor ataxia, on the mind, the testimony of reputable experts was offered by the contestants, but rejected by the court, for the reason, that a *prima facie* case of incapacity had not been made out, and the further reason, that a hypothetical question put to the experts, purporting to embrace the facts, omitted material facts proven by appellee. We do not think the grounds of the rejection sufficient. The testimony when added to that already in, might have, if duly considered, affected the judgment and changed the result. But a comparison of the hypothesis with the facts contestant's evidence tended to prove, shows it embraced every material fact he alleged. He was not bound to include in it, facts alleged by proponents which he denied, or facts which may be fairly considered irrelevant. Hence, in passing on the testimony we take into consideration that which was rejected.

The learned judge of the court below went beyond the issue in his finding, when he declared the testator possessed "testamentary capacity of the highest order." And while if the issue presented only this one question, the error might be of no consequence, yet because of the two questions as will be noticed in our discussion hereafter of that relating to undue influence, the error becomes very material, and therefore requires notice. Take first the undisputed facts: An aged man, worth over \$300,000, makes his will; he has six children; he gives more than three-fourths to one of them; for ten years before his death, a period covering the date of the will, he drank largely of intoxicating liquors, besides was sorely afflicted with an incurable disease. Next, take the disputed facts: The testimony of the disinterested witnesses shows, that by reason of the excessive use of liquor, he was in almost a constant state of intoxication. Interested witnesses then testify to the consumption during that period by him daily, of unusual quantities of intoxicants, that in consequence his memory had failed, and his powers of will had weakened. Is it probable, in view of the undisputed facts, as well as those disputed, that testator had testamentary capacity of the highest order? Without considering the expert testimony, is not such a conclusion opposed to common knowledge derived from observation? In our judgment, there was manifest error in so finding.

But keeping within the scope of the issue, did he possess simply testamentary capacity? That is all the law requires in a valid testamentary disposition. This the court below could have found, notwithstanding testator's established

habits of intoxication. Even a judicial decree, that he was an habitual drunkard and the appointment of a committee would have been, although conclusive as to contractual, only *prima facie*, evidence of testamentary incapacity: *Lecky v. Cunningham*, 56 Pa. 370. While we are of the opinion the evidence wholly fails to establish a high order of testamentary capacity, we will not say the testator was destitute of that mental capacity, requisite to a valid testamentary disposition of his property. On this first branch we sustain the court in refusing an issue, not because the decree is clearly right, but because it is not clearly wrong. The evidence of incapacity, taken altogether, is not of that weight which should constrain us to send the case to a jury.

The next question is, was the will procured by undue influence over the testator by his son Florence C. Miller? This is a question of pure fact. As is said in *Herster v. Herster*, 116 Pa. 612, "Its disposition properly rests with the jury alone. Even if the trial judge should feel that were he sitting as a juror, he could not regard the evidence as sufficient to induce him to find a verdict against the will, that is not enough to justify him in taking the case entirely from the jury. * * * If the testimony is such, that after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict, as contrary to the manifest weight of the evidence, it cannot be said, that a dispute within the meaning of the act has arisen. On the other hand, if the state of the evidence is such, that the judge would not feel constrained to set it aside, the dispute should be considered substantial, and an issue to determine it directed. * * * It is perhaps well to say that undue influence may be exercised secretly as well as openly, and this especially possible, where a confidential relation exists between the principal devisee and the testator, and they dwell together in the same house." This is the substance of our authorities in Pennsylvania on the subject.

Take now the undisputed evidence as to the testator's age, habits and disease at the date of the will and codicils, what is the reasonable inference to be drawn as to his testamentary capacity? Can it be of that order which it undoubtedly was twenty or thirty years before his death and before it had become impaired by age, drunkenness and physical infirmity? Assuming as we do assume, with the court below, that testamentary capacity existed and that if voluntary and independently exercised testator was competent to make a valid will, yet was the

capacity such as by reason of its impairment it could easily be operated upon by outside influence? Then follow the facts, that Florence C., the son, lived in the house with his father, was his confidant for years, close to his person, his helper in his physical infirmities, his adviser in his business affairs; then come the gross inequalities in the distribution of the large estate; the confidant is largely the beneficiary. Next notice the affirmative testimony of the witnesses. B. F. Young testifies that he frequently saw Florence with his father when the latter was intoxicated. Once on the cars from Uniontown to Pittsburgh, he says: "I spoke to Florence in reference to the old man's condition at the time, and asked him why he alone always accompanied the old gentleman in that condition; he answered, at the same time striking his chest with his hand, that there was boodle in it for him." Further on, after stating that he had remarked to Florence he supposed his father would leave his brother Hampton in good circumstances, Florence replied: "He mustn't be too — sure of that, because I have got something to say in the matter." Then about four months after the father's death he asked Florence what chance his brothers and sister would have to break the will, and he replied: "They didn't have the least possible show on earth, that he had things too well fixed for that." Virginia B. Winston, the daughter, testifies, that in 1881, Florence made a proposition to her to join him in a conspiracy to have the other brothers disinherited, which she refused. Sarah Outlaw, a servant, testified, that she frequently heard Florence say he could do anything he pleased with his father. Nine witnesses, interested and disinterested, give like testimony, tending to show the extent of the influence obtained by Florence over his father, from a time antedating the will until his death.

"Where a testator, although possessed of testamentary capacity, is aged, infirm bodily with mental faculties impaired, if a confidential adviser be largely a beneficiary under the will, there is a presumption of fact, that undue influence was brought to bear on the mind of the testator, and the burden is on him to rebut the presumption:" *Wilson v. Mitchell*, 101 Pa. 495; *Amor's Estate*, 154 *Id.* 517. If, in aid of this presumption, many witnesses testify to positive acts and express declarations indicating the unscrupulous intention of the confidant to exert his influence in his own favor, can it be said there is no case for a jury?

Many reputable witnesses were called by proponent and heard by the court, whose evidence tended to establish a degree of sobriety on the

part of the testator that he correctly transacted legal business for his clients and that when they saw him he was not under the influence of liquor, and conversed intelligently. The effect of their testimony was to show that, certainly at times, testator was not incapacitated to make a valid testament, and it properly had great weight with the court on this branch of the case. But it tended in a slight degree to negative the testimony of contestant, adduced to show the undue influence exerted by Florence over his father. The court treats the evidence of the brothers and sister as deserving of little credit, because of their interest; but it must be borne in mind, that on questions of this kind, the members of the testator's family and the inmates of his house, are generally the only witnesses who have every opportunity to observe the relations between the maker of a will and him whose unlawful influence procures it. Their interest may affect their credibility, but if they had no interest, they would seldom be in a situation to know anything material to the issue. The learned judge, also, denies the credibility of the disinterested witnesses, and arrives at his conclusions, by practicably disregarding the testimony of both classes, interested and disinterested. But it was peculiarly the province of the jury to pass on the credibility of these witnesses, as has been held over and over. The learned judge does not take up the evidence and determine whether there is a substantial dispute demanding an issue, but he considers the bearing of the evidence on the issue as if granted, analyzes, weighs it on both sides, credits and discredits witnesses, then determines according to his judgment the truth of the matter. He performed as one juror a duty which the law imposes on twelve. In fact, there is no dispute of this character in which a jury could possibly have any duty to perform, if the judge chose to assume it, to the extent it was assumed in this preliminary inquiry.

That Florence was not personally present when the will was executed is a fact to be considered with all the other evidence in the case bearing on the question of undue influence. The court treats this as most conclusive evidence in favor of the will. But this fact of itself has no such significance. If it had been alleged Florence by threats or other means had excited the fears of the father on the day the will was made, and that in terror he had given him the bulk of his estate, the fact that he was not personally present when his father and the witnesses subscribed their names, would have almost conclusively negatived such a theory; but no such theory is put forward here. It is

averred, however, that by long course of deception and falsehood practiced upon his father Florence had prejudiced him against his other children and had ingratiated himself in his favor, with a special view to becoming the principal object of his bounty. Witness after witness was called whose testimony tended to show this. If such were the case and the father became thereby embittered against the other children, and especially adopted Florence as his favored child, it was not specially important that Florence was not present when the will was signed. The machinations, it was alleged, which had prompted such a will, had been practiced to that end for years preceding it, and were kept up for years after to guard against a change of it. Assuming this to have been Florence's conduct he would naturally absent himself at the time the will was actually subscribed.

We think on the lines of the testimony pointed out appellant had a case for a jury on the question as to whether the will had been procured by undue influence of the son upon the father. And while the evidence tending to establish testamentary incapacity is not sufficient to warrant its submission to the jury on an issue involving that question, it is admissible in the determination of the second question. The condition of the mind of a testator, alleged to have been unduly influenced, although of testamentary capacity, is important in determining whether the act was the result of the fraudulent acts practiced upon him.

The decree of the court below is reversed, and it is further ordered that an issue be awarded to determine whether the alleged will and codicils were procured by the undue influence of Florence C. Miller.

Eo die. MITCHELL, J., dissenting. There is in this case, *first*, strong affirmative proof of every element of testamentary capacity in the act itself, the will, the codicils, and the circumstances of their making.

Second, The overwhelming testimony of witnesses who knew the testator, and who also knew the requisites of testamentary capacity.

Third, The conclusive evidence of the actual transaction of business, personal, professional, and as trustee, amounting, during the period involved, to more than a million dollars, and no pretense that any single transaction showed incapacity.

Fourth, On the other side the testimony of interested witnesses and the opinion of experts not worth a rush against the proved facts.

There is no trace of undue influence in the making of the will or the codicils, or in the

separate custody of them by the testator for years before his death. That he preferred one child over others was his right as a parent, and that he preferred the son he did, ought not to surprise any one who reads the testimony even of the others. That the motives of the favorite may have been partly mercenary would not affect the fact that he was the only one who stayed with, and assisted his father in his old age, or whose conduct in fact was not such as tended to drive him to drink or to the grave.

As I am of the opinion that the evidence is not sufficient to permit a jury to set aside this will I would affirm the judgment.

FELL, J., joins in this dissent.

Court of Common Pleas, WESTMORELAND COUNTY.

In re LATERAL RAILROAD OF BESSEMER COKE COMPANY.

The Act of February 17, 1871, relating to the construction of lateral railroads, repeals the Act of April 6, 1858, and leaves to the jury to determine the question of whether the road is a necessity as well as the determination of the amount of damages to be assessed for land taken.

Under the latter act the necessity of the road must first be determined before a bond can be given by the company desiring to build the road.

No. 361 Aug. T., 1896. Exceptions to the report of viewers.

Opinion by DOTY, P. J. Filed November 7, 1896.

On June 15, 1896, the Bessemer Coke Company presented a petition to the court under and pursuant to the provisions of "An Act regulating lateral railroads," approved May 5, 1832, and its supplements. The petition avers, *inter alia*, that a single track lateral railroad is necessary and useful for private purposes, in order to enable the petitioner to transport the coal underlying its lands to market. Viewers were accordingly appointed, and in due time filed their report. To this report the United Coal and Coke Company filed exceptions, and also appealed from the report of the viewers to the Court of Common Pleas.

The principal matter of complaint in the exceptions is that the viewers refused to hear any testimony in relation to damages or to the necessity of the road for public purposes. So far as the location of the road is concerned, the matter appears to rest in the discretion of the petitioner: *Hays v. Risher*, 21 Pa. 169; *Hays v. Briggs*, 74 Id. 384. No case cited holds that the

viewers are required to hear testimony as to the damages and the necessity of the road. In analogous proceedings, the practice of hearing testimony on the question of damages is at least commended: *Penna. R. R. v. Keifer*, 22 Pa. 356; *Penna. R. R. v. Porter*, 29 Id. 165. But it is unnecessary now to determine the question raised by exception. An appeal has been taken. On the trial of the appeal, the exceptant will have a hearing. The exceptions will therefore be overruled.

There is one other matter which requires attention. The petitioner has presented a bond for approval. The application is based on the Act of April 6, 1858, P. L. 361. That act provides: * * * "And when, in the opinion of the court, the road is necessary for public or private use, it shall be lawful for the petitioner, upon giving bond, * * * to proceed in the opening, construction, completing and using the said railroad." * * * Under this act, it was for the court to determine the necessity of the road. The location was fixed by the petitioner. The necessity of the road was determined by the court after the report of the viewers. The only matter for the jury was the amount of damages. Under such circumstances, it was right to permit the petitioner to complete the road upon giving bond with sureties to be approved by the court.

On February 17, 1871, an act, entitled "An Act supplementary to the acts relating to lateral railroads," was passed by the Legislature in the following language: "In all proceedings now pending, or which may hereafter be instituted to procure the right to construct lateral railroads, or for the acquisition of landings or wharves, or for either of said purposes, the appeal to court from the report of the viewers shall extend not only to the assessment of damages, but to the question of the necessity of the proposed lateral railroad, wharf or landing, and shall also extend to the question whether such landing or wharf is necessary to the owner thereof for his own uses or purposes; and if the jury shall so find, the same shall not be taken from him."

The exceptant contends that the Act of 1858 is repealed by the Act of 1871; that the necessity of the road is to be determined not by the court, but by the jury, on appeal, and that the court ought not to approve the bond until the necessity of the road is determined. The petitioner contends that the Act of 1858 is not repealed by the Act of 1871; that the Act of 1871 is supplementary to the Act of April 24, 1843, P. L. 361, and applies to those cases only where the petitioner for a lateral railroad also proposes to acquire a wharf or landing in connection there-

with. If the latter contention is sound, the court should at once determine the necessity of the road. If deemed necessary, then the bond should be approved and the petitioner allowed to proceed. If determined unnecessary, there would be nothing to try on the appeal.

There is no ambiguity in the language of the Act of 1871. It is not only plain, but comprehensive. There is no intimation that it is intended to apply only to cases where the petitioner for a lateral railroad also proposes to acquire a wharf or landing. The act reads: "In all proceedings * * * to procure the right to construct lateral railroads, or for the acquisition of wharves or landings, or for either of said purposes, the appeal to court from the report of said viewers shall extend not only to assessment of damages, but to the question of the necessity of the proposed lateral railroad, wharf or landing."

The language necessarily applies to every proceeding to procure the right to construct a lateral railroad. It is not confined to a proceeding to procure a wharf or landing. The act does not simply provide that, in every proceeding to procure a lateral railroad, the appeal shall extend, etc., but it specifies particularly, "or for the acquisition of wharves or landings, or for either of said purposes," etc. If the act means what the language fairly imports, it is for the jury to pass not only on the matter of damages, but also on the question of the necessity of the proposed lateral railroad. There is no doubt what is meant by "the appeal to court from the report of viewers." Under the original act relating to lateral railroads, the necessity of the road was for the jury. Under the Act of 1858, the question of necessity was for the court, and the only matter that was tried on the appeal was the assessment of damages. But this was by virtue of the Act of 1832, as the Act of 1858 was a supplement to the original act, and contained no provision for an appeal. The only matter that could be brought up on an appeal, to wit, the assessment of damages, was for the jury. It is now provided in the Act of 1871 that the appeal shall extend not only to the assessment of damages, but to the question of the necessity of the proposed lateral railroad. It would seem to necessarily follow that the question of necessity is to be tried in the same manner of damages. Where there is no ambiguity in the language of the act, the only safe course is to follow the plain and literal meaning of the words contained in the act.

Mr. Justice GREEN, in the *City of Pittsburgh v. Kalchauer*, 114 Pa. 547, condemns any other course in the following language: "It is a prac-

tice to be avoided and not followed. It has been condemned by many text writers and by many courts. Occasionally, it has been departed from, but the path is a devious and dangerous one, which ought never to be trodden, except upon considerations of the most convincing character and the gravest moment."

If the Act of 1871 is valid, and its validity is not attacked, the question of the necessity of the proposed lateral railroad is to be determined by the jury on the appeal, as was the case under the Act of 1832: *Harvey v. Lloyd*, 3 Pa. 331.

If the necessity of the road is for the jury, the bond ought not to be approved until the question of necessity is determined. Under the Act of 1858, it was not lawful for the petitioner to give bond until after the court had adjudged the road necessary for public or private use. Until that question is determined by some authority, it seems clear that the land ought not to be appropriated. Such delay is no hardship on the petitioner. If the railroad is necessary for the development of its coal, the necessity could have been anticipated and the proceedings to procure the right to construct such road could have been instituted in advance of the time fixed for actual operations. The delay need not be a protracted one, as the Act of 1832 provides that the issue after the appeal shall be placed first on the trial list of the next regular term of court.

And now, November 7, 1896, the exceptions to the report of the viewers are overruled, and, for the reasons stated above, approval of the bond is withheld.

For exceptants, *Atkinson & Peoples*.

For petitioner, *Williams, Sloan & Griffith*.

Orphans' Court.

In re Estate JOSEPH S. BROWN, Deceased.

- (1.) Where possession in the trustee is essential, an active trust is created.
- (2.) The cases relating to the characters in which coal and its proceeds shall be regarded fall into four classes:
 - (a) Those in which the coal had neither been severed by contract from the surface, nor opened for mining; and therefore constitutes part of the *corpus* of the land.
 - (b) Those in which mines have been opened by the owner who was an occupant of the land, and his widow takes under the intestate law a share in the coal actually mined during her life.
 - (c) Those in which the proceeds of so-called leases made by the owners of land have been treated after death as part of the *corpus* of the personal estate; and of these *Lazarus' Estate*, 145 Pa. 1, is the leading case; and
 - (d) Those in which the proceeds of leases made by virtue of testamentary power have been treated as income; and of this *Eley's Appeal*, 103 Pa. 300, is the leading case.

No. 158 Dec. T., 1896. Application for instructions.

J. S. Brown, after giving certain specific legacies, including \$60,000 to Mrs. Brown, gave "the entire income of the remainder and residue" of his estate to Mrs. Brown "for and during the term of her natural life," then to his daughter for life, then over on successive contingencies. In the event of his wife's death before his daughter, and his daughter's death without issue, after the gift of certain other special legacies, he gave "the rest and residue" of his estate to his executors "for the erection and maintenance" of public bath houses "in with a letter of instructions" to his executor. Then followed:

"Sixth.—My real and personal estate undisposed of I give, devise and bequeath to The Safe Deposit Company of Pittsburgh in trust, however, for the payment of the income as hereinbefore provided to my wife and daughter." With power in said trustee to sell real estate with the consent of the widow.

Included in the residuary was a lease of certain coal with power to mine to exhaustion, and rent payable annually.

Opinion by HAWKINS, P. J. Filed December 17, 1896.

This proceeding raises two questions for determination:—

(1) Whether or not the will of Joseph S. Brown created a valid active trust in the residue during the life of his widow; and

(2) Whether the proceeds of coal sold by Mr. Brown, specified in the petition, constitutes part of the *corpus* of his residuary estate, or is to be treated as income.

(1) While there is some confusion in the arrangement of the will, a careful analysis shows that the intent was to vest the legal title of the residue in The Safe Deposit and Trust Company. Following the special bequest contained in the first and second clauses there is a disposition of the income; but until the sixth clause no express disposition of the *corpus* during Mrs. Brown's life. The sixth clause evidently had this purpose. The gift of the "real and personal estate undisposed of" to The Safe Deposit and Trust Company, is identified as the source "of the payment of the income hereinbefore provided" for testator's "wife" and "daughter," and necessarily embraced the residue which had in fact been made the source of payment. The absolute gift of the special legacy to the widow in the first instance followed by the express creation of a trust in the residue for payment of the income to her for life only, the

gift over on contingent remainder and the power vested in the executors to make sales of real estate, made the continued possession by the trustee of the residuary estate essential, and the trust therefore active: *Odgen's Appeal*, 70 Pa. 501. The absolute gift of one part of the estate, followed by the qualified gift of another, itself implied an intent to vest in the widow possession of the *corpus* in the former, and its exclusion in the other.

In ordinary cases gifts for life and then over, transfers to the *cestui que vie* of the *corpus* on giving refunding bonds for which the Act of 1832 provides, is an adequate arrangement; but the contingencies for which provision is made in this will are so numerous and complicated, that this would be not only inadequate but burdensome. In one event the daughter will take the income for life; in another her issue, if any; and in yet another the trustee's possession of the residue will be necessary to the scheme for the erection of public baths. All these may arise in quick turn, and will involve new refunding bonds, successive settlements, new delays, loss, costs, expenses, and probably litigation, which the active trust contemplated by the testator will avoid.

The case of *Parker's Appeal*, 61 Pa. 478, cited on behalf of the widow, cannot be "taken for a precedent" because the question of trust involved there arose upon an implication which was not imperative. There was a direct bequest of the principal for life which the court said was not to be overcome by the implication that the interest was "to be paid" by the executors and thus continue their duties indefinitely. "Implications often yield to implications, and always to positive and clear directions. * * * As the principal fund was necessarily intended to be invested in some way in order to produce an interest, it was not an uncommon mode of expression to say it was 'to be paid' to the legatee entitled to receive it. If invested, the interest would be paid by somebody to the parties entitled, and in this sense we may regard the words to have been used, especially in the presence of the clear bequest of the fund to the legatee." But here there was a clear specific bequest of the principal to a trustee coupled with active duties, and a gift of the "income" only, to the widow during life.

(2) The cases relating to the characters in which coal and its proceeds shall be regarded readily fall into four classes:—

(a) Those in which the coal has neither been severed by contract from the surface, nor opened for mining; and therefore constitutes part of the *corpus* of the land.

(b) Those in which mines have been opened by the owner who was an occupant of the land, and his widow takes under the intestate law a share in the coal actually mined during her life.

These two classes are so well established that there need be no citation of authorities in their support.

(c) Those in which the proceeds of so-called leases made by the owners of land have been treated after death as part of the *corpus* of the personal estate; and of these *Lazerus' Estate*, 145 Pa. 1, is the leading case; and

(d) Those in which the proceeds of leases made by virtue of testamentary power have been treated as income; and of this *Eley's Appeal*, 103 Pa. 300, is the leading case.

The classification indicated in paragraphs (c) and (d) was clearly recognized, and the reason which gave rise to it was given, in *Eley's Appeal*, thus: "In seeking for the testator's intention, we derive little or no assistance from that class of cases in which it has been properly held that a lease of the exclusive right to mine and remove coal or other minerals, without limitation as to quantity or time, is practically a sale of the coal or other mineral in place, and consequently a sale of a portion of the land itself. The word income means the gain which accrues from property, labor or business. In its ordinary and popular meaning, it is strictly applicable to periodical payments, in the nature of rent, which are usually made under coal and other mineral leases, and we have no doubt it was used in that sense by the testator. In the absence of any provision, express or implied, that the payments in the nature of rents shall be accumulated for the ultimate benefit of those in remainder, it would be a strained and unnatural construction of the will to hold that he intended to give appellants only the annual interest on the installments of rents. The fact that they are tenants for life by virtue of the will of the owner, and not merely by operation of law, as in the case of tenants by the curtesy, etc., must not be lost sight of. In the latter case the right of the life tenant is absolutely fixed and determined by law, while in the former, the extent of the rights of appurtenant to the life estate must be determined by the will, construed in accordance with the intention of the testator."

It will thus be seen that the one class arises by operation of law, and the other by construction.

It may be conceded that the opinion in *Woodburn's Estate*, 138 Pa. 606, is not in harmony with the classification which has been given; but an examination of that case will show that

the facts and judgment as reported place it in the third class. The testator gave an oil lease; and by his will created a trust of his estate under which the widow refused to take. The executor's account embraced the proceeds of oil developed both before and after testator's death; and one-third was awarded the widow absolutely. If this lease of oil, like that of coal, be treated as a sale, there was a conversion of the whole into personalty which passed as *corpus* on the death of the vendor to his personal representatives. As in respect of the widow there was no will in contemplation of law, there was no question of intent involved; her rights were "fixed and determined" by the intestate law, and she thereupon became entitled to one-third absolutely in distribution. The question of income was not necessarily involved. The recent case of *Wettengel v. Gormley*, 160 Pa. 559, gives so different an effect to the partition of land on the ownership of oil, from that which prevails in respect of underlying coal, that it may well be doubted whether they can now be classed together; but regarding *Woodburn's Estate*, *supra*, as being inconsistent with the classification which has been given, it is but a single exception and must yield to the strong current of adverse decision.

The facts of the present case bring it within the third class. The coal having been sold by Mr. Brown in his lifetime, its character as personalty became thereby "fixed and determined by law," necessarily passed to his executors as *corpus*: *Lazerus' Estate*, 145 Pa. 1; and the widow was entitled to the income only.

This court therefore declares,—

(1) That the will created a valid active trust of the residuary estate in The Safe Deposit and Trust Company during the life of Mrs. Brown; and

(2) That the proceeds of the sale of coal specified in the petition constitutes part of the *corpus* of the residuary estate on which Mrs. Brown is entitled to the income only during life.

For Mrs. Brown, *Geo. W. Guthrie*.

For trustee, *A. H. Miller*.

—Judge CAMPBELL tells a story about the cross-examination of a bad-tempered female in his court. She was an amazonian person. Her husband, obviously the weaker vessel, sat sheepishly listening. The opposing attorney pressed a certain question rather urgently, and she said angrily: "You needn't think to catch me. You tried that once before." The lawyer said, "Madame, I have not the slightest desire to catch you, and your husband looks as if he was sorry he did."

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No. 27.

PITTSBURGH, PA., JANUARY 27, 1897.

Supreme Court, Penn'a.

HAYES et al. v. TREAT et al.

The presumption arising from a deed of real estate to the individuals composing a firm, that they hold as tenants in common, and not as partners, is rebutted by the fact that the property was bought with partnership property.

Trustees of a church were negotiating for the purchase of a certain lot of land. Plaintiff told the wife of one of the church members, who was not a trustee, that she had an interest in the land, and would not sell. *Held*, that proof of this declaration was incompetent for the purpose of showing notice of plaintiff's claim.

Appeal of Milo C. Treat, William L. McCleary and Isaac J. Dickson, trustees of the Baptist Church of Washington, Pa., defendants, from the judgment of the Court of Common Pleas of Washington county, in an action of ejectment brought by Margaret Hayes, Katharine, Lola B., Margaret F., Bessie and Charles H. Hayes, and Sarah Forrest, widow and heirs at law of Charles Hayes, deceased, to recover an undivided moiety of a lot of ground situated on the south side of East Wheeling street, in the borough of Washington, on which the defendants had erected a church edifice, and of which property they were shown to be in possession.

The facts sufficiently appear in the opinion of the Supreme Court, *infra*.

For appellants, *David Sterrett, J. M. Braden and Boyd & E. E. Crumrine.*

Contra, T. F. Birch.

Opinion by WILLIAMS, J. Filed November 9, 1896.

Sheldon B. Hayes and Charles Hayes were brothers and partners in business. The time when the partnership was entered into does not appear, but it seems to have been in existence, and to have been successfully conducted, for many years prior to 1873. In that year they entered into an agreement as partners for the purchase from Mrs. Martha B. Montgomery of the lot of land, in the borough of Washington, now in controversy, for the price of \$3,100. The purchase money was paid out of partnership funds. They entered into possession as partners, and conducted a partnership business upon

it. The deed was made to them in 1874, and names the individual partners, S. B. Hayes and Charles Hayes, as the grantees. S. B. Hayes died in 1879, but his son Marshall took his place in the firm, and the business was continued for the benefit of the surviving partner, Charles Hayes, and the family of his deceased brother, no settlement having been made. Charles died in 1886, but the firm business was continued under the same firm name, and without settlement, until the death of Marshall Hayes, in 1891. After his death, his executors and the executors of Charles Hayes joined in a sale of the lot in controversy to the defendants, for the sum of \$6,300, treating it as a part of the property of the partnership. The purchasers paid \$4,300 in hand upon the contract, of which \$4,000 was at once applied to the payment of a partnership debt contracted in 1884, some two years before the death of Charles Hayes. For this debt the estate of Charles was liable, and the payment made upon it, at least to the extent of half of the amount, was in relief of the estate of Charles Hayes. The plaintiffs are the widow and heirs at law of Charles, and their claim in this case rests on the position that S. B. and Charles Hayes were tenants in common in this lot, and that the undivided one-half of the title descended to them at the death of Charles Hayes, as a part of his individual estate. The controlling question upon the trial in the court below was, therefore, whether this lot of land was held by S. B. Hayes and Charles Hayes as partnership property, or as their individual property. This, in the absence of any written declaration upon the subject by the grantees named in the deed, was to be determined by their conduct and the ownership of the fund out of which the purchase money was paid. The question is not raised by creditors of either the firm or the individual members of it, but by the heirs at law of one of the partners against the executors of their ancestor. There is therefore no question of priority or of notice to be considered, but simply one of ownership.

What was the fact as to the ownership as between these brothers, S. B. and Charles Hayes? The general rule is that, if the real estate is bought with partnership funds and for partnership purposes, it is partnership property, notwithstanding the deed may be made to the individuals of whom the firm is composed: *Bates, Partn.*, § 230. Our own cases holding this general doctrine are numerous and consistent. In *Erwin's Appeal*, 39 Pa. 535, the title was in the name of one of the partners, but the lot had been bought for partnership purposes, and paid for out of partnership moneys. For some rea-

son, it had not been used by the firm, but it was held to be partnership property; and its proceeds were distributed among partnership creditors, in preference to the creditors of the grantee named in the deed. So, in *Abbott's Appeal*, 50 Pa. 234, this was the only question raised, and we said that the presumption arising from the fact that the deed was to the individual partners was rebutted by the facts that the land was bought for partnership purposes, and paid for with partnership funds. Under such a state of facts, the grantees named in the deed take the legal title in trust for their firm, which pays the purchase money, and for whose use the purchase is made. To the same effect are *Meason v. Kaine*, 63 Pa. 335, and *Association v. Reed*, 80 Id. 88. *Shafer's Appeal*, 106 Pa. 49, states the rule very fully, and that payment of the purchase money out of the partnership funds for property bought for firm uses rebuts the presumption arising from a deed to the individual members of the firm. *Warriner v. Mitchell*, 128 Pa. 153, takes the distinction between a contest made by creditors and one made by the partners with each other. In the latter case it was held that land bought with partnership funds, used for partnership purposes, and treated as partnership property, is partnership assets, notwithstanding the deed may be held by individual partners. The same rule was stated in *Collner v. Greig*, 137 Pa. 608. The importance to be given to the fact that the property had been bought for some partnership purpose is illustrated by *Coder v. Huling*, 27 Pa. 84, where it was held that, if the property had not been purchased for the use of the firm, the payment of the purchase money, standing alone, would not rebut the presumption arising from a deed made to the individual partners. In this case, therefore, we are of opinion that, as the plaintiff relied upon the presumption arising from the deed, the learned judge would have been warranted in telling the jury that, if satisfied that the land in controversy had been bought for the use of the firm of S. B. & Charles Hayes, had been paid for with partnership moneys, and treated by them during their lives as partnership property, the presumption arising from the deed was fully rebutted, and the plaintiffs could not recover against the vendee of the representatives of the partnership.

This view of the main question presented on this record makes the treatment of the several assignments of error separately a matter of little importance, but, as the case goes back, it may be best briefly to consider them.

The first assignment is sustained. It relates to an effort to show notice to the trustees of the

Baptist Church. Proof of a conversation between one of the plaintiffs and a woman who was not even a member of the church, but whose husband was, although he was not one of the trustees, is wholly incompetent for the purpose of showing notice.

The assignments Nos. 2 to 11, inclusive, are to the admission of deeds for other property, having no relation to the property in controversy, but purchased at various times by the firm or one of its members, for purposes not disclosed by the testimony. These assignments are sustained.

Numbers 12, 13 and 14 are to the admission of the testimony of the several plaintiffs to show that they had not assented, directly or indirectly, to the sale of the property to the trustees of the Baptist Church. This could only be competent in case their assent had been alleged by the defendant. It is wholly immaterial whether they give or withhold their assent if this was partnership property.

The twenty-first and twenty-third assignments relate to the character of the proof required in cases where a written instrument is alleged to be different from the agreement actually made by the parties and its reformation is sought. The general rule in such cases is as stated, but the simple affirmance of the points embodied in these assignments was, upon the evidence in this case, calculated to mislead the jury. The evidence of the plaintiff was the deed from Montgomery and wife, and the presumption arising upon it. The proofs of the defendants showed the facts necessary to rebut that presumption, and establish the title of the partnership. This evidence was clear, precise, and, as we understand, no effort was made to reply to it or throw doubt upon it. If so, it may be said that, subject to the credibility of the witnesses, it was indubitable. If the jury were satisfied by it that the partners bought the lot for partnership uses, with partnership money, and treated it as partnership property, then the *prima facie* of the deed was successfully overcome, and the title of the partnership established. It was not error to affirm these points, as we have already said, but it would have been better to have explained the extent of the application of the rule invoked to this case upon the evidence that was before the jury.

The remaining assignments of error relate to some phase of the general question which we have already considered, and do not require to be separately treated.

The judgment is reversed and a venire facias de novo awarded.

Court of Common Pleas, WESTMORELAND COUNTY.

EMMENSITE GUN AND AMMUNITION COMPANY v. POOL.

A constable's return of a summons issued out of a justice's court against a corporation was "served true copy * * * at the office in the presence of John B. Irwin." * * * *Held*, that such return was fatally defective in that it did not appear that Irwin was a statutory representative of the company, or that he had anything more to do with the matter than John Smith.

An appearance by Irwin before the justice, whose record showed no authority on the part of Irwin to bind the company by his appearance, does not cure the insufficiency of the service of the summons.

No. 343 Feb. T., 1896. *Certiorari* to justice of the peace.

Opinion by McCONNELL, J. Filed November 7, 1896.

The 38th section of the Act of June 13, 1836, P. L. 568, provides as follows: "The sheriff or other officer serving any writ of summons shall in all cases state in his return the time and manner in which the service thereof is made." The 41st section of the same act also provides that "every corporation, aggregate or sole, shall be amenable to answer upon a writ of summons as aforesaid, and in the case of a corporation aggregate, except counties and townships, service thereof shall be deemed sufficient if made upon the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation, in the manner hereinbefore provided." "The manner hereinbefore provided," as it is set out in the second section, is "by reading the same in the hearing of the defendant, or by giving him notice of its contents and by giving him a true and attested copy thereof; or, if the defendant cannot conveniently be found, by leaving such copy at his dwelling-house in the presence of one or more of the adult members of his family; or, if the defendant resides in the family of another, with one of the adult members of the family in which he resides."

In the case of the *Lehigh Valley Insur. Co. v. Fuller*, 3 W. N. 9, Mr. Justice SHARSWOOD says: "It is clear that the return must show on its face a legal service." "The court will set aside the return if defective:" 4 Pa. 501.

It is equally clear that if a justice's record does not show that a defendant has been brought into a justice's court by legal process, that the proceedings will be reversed on *certiorari*. The particularity observed in the statute in prescribing the exact manner of service, and in enjoin-

ing the executive officer to make a return of the specific mode of service, evinces a design to make the record of the case show affirmatively all that is essential to give the court jurisdiction over the parties to the action and the cause in controversy. This is especially true of the records of a court of limited and solely statutory jurisdiction, such as this one is: *Mutual Life Insur. Co. v. Cook*, 14 C. C. 434; *Mutual Life Insur. Co. v. Keating*, 5 Kulp, 357; *Culligan v. Russell*, 2 W. N. 440; *Metropolitan Life Insur. Co. v. Cook*, 3 Dist. Reps. 625; *Bush v. Benefit Ass'n*, 4 Id. 175.

The return of the constable as set out in the justice's transcript is as follows: "And now, December 5, 1895, summons returned on oath. Served a true copy of original summons at the office in the presence of John B. Irwin, at the same time producing the original and informing him of the contents thereof. Jacob Swartz, constable." It therefore does not appear from the transcript that the summons was served "upon the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation," as the 41st section of the Act of June 13, 1836, requires. This is the error assigned in the specification of error, and it must be sustained, unless some other statute supports this form of record.

It is contended that the third section of the Act of March 21, 1849, affords it sufficient support. So far as pertinent, it reads as follows: "And in the commencement of any suit or action against any such foreign corporation, process may be served upon any officer, agent or engineer of said corporation, either personal or by copy at the office, depot or usual place of business of said corporation, and such service shall be good in law to all intents and purposes."

It was said by Mr. Justice GREEN, in *Central R. R. Co.'s Appeal*, 102 Pa. 38, that "service must be upon some person who is a representative of the corporation designated in the act, and that fact must appear in the return or affidavit of service."

The act requires that the service be upon "an officer, agent or engineer of said corporation." Service upon any one not so designated is of no avail, because the act has not said that it shall be. If the return showed that it had been made in the manner prescribed by the statute for serving process on a foreign corporation, we might possibly be allowed to infer from the manner of service the fact that defendant was a foreign corporation; but when the return does not show service upon a person liable to service as the representative of either a domestic or foreign corporation, there is nothing on which

an inference can depend. If the service appeared regular on its face, though false in fact, we would consider it conclusive on the parties. But this is not regular. It does not appear in the return or in the record that the plaintiff is a foreign corporation, and it does not appear that process was served on any statutory representative of the corporation, whether it be domestic or foreign. It does appear that service was made on John B. Irwin, but it does not appear that he had anything more to do with the matter than John Smith. Leaving "a true copy of the original at the office" cannot be in itself a good service. It must be served on some person, and that person is not simply any person, but it must be one who is an "officer, agent or engineer" of the corporation. The mode of service may be either (1) personally, or (2) copy, or (3) by leaving a certified copy thereof at the office, depot or usual place of business of said corporation, but the knowledge communicated by the service is to a person who stands in a relation described as "officer, agent or engineer of such corporation." Knowledge cannot be communicated to the artificial person named as defendant in the action, except through a natural person having a right to represent it. This is not an attachment commenced by a seizure of defendant's property, but it should be a service of summons by communicating knowledge to defendant's representative. This does not appear from the record to have been done, and therefore the corporation was not in court.

The justice's record shows that the parties appeared. If this was unqualified, it would cure the defect of service, for the appearance is the thing that service is designed to effect. The justice's record, however, shows that the appearance is by this same John B. Irwin, and not by any one alleged in the record to have a legal right to bind the company by such appearance.

If we look into the affidavit of John B. Irwin, made February 15, 1896, and presented at the argument, we learn therefrom that as a matter of fact he was not an officer, stockholder or director of the corporation, but that he had been employed as a watchman at the plant at the instance of Cuyler, Morgan & Co., who are mortgagees, and that he was paid for his services by them, and had no authority as a representative of the corporation in the magistrate's court. Where a return is irregular, at least, on a motion to strike it off, depositions may be taken to ascertain the truth about controverted matters. But in this case it does not appear that the defendant corporation was ever served at

all. "It is clear that the return must show on its face a legal service:" *Insurance Co. v. Fuller*, 3 W. N. 9, per Justice SHARSWOOD.

A sheriff's return showing a service on "W. B. Whitney, last president of said corporation," was set aside by Judge THAYER in *Powder Co. v. Coal Co.*, 8 W. N. 77. The return should have been that he was president, "and that the writ was served upon him as president. A sheriff's return must show that he has pursued the directions of the statute. It must be certain, at any rate to a common intent, and not ambiguous or argumentative."

Therefore, without even treating the affidavit as a deposition, the record is fatally defective, and the judgment of the justice must be reversed.

For plaintiff, *Moorhead & Head.*

For defendant, *G. S. Rumbaugh.*

BEAVER COUNTY.

DAWSON v. KIRBY.

In an attachment before a justice under the Act of July 12, 1842, the return of the constable should show whether the defendant was in the county and whether the property attached was taken into the possession of the constable or released on bond, and for lack of this showing in the return the proceedings will be set aside. Under the above act only such articles as are capable of manual seizure are subject to attachment. Interests in an oil lease or an oil company are not subject to attachment under the act.

No. 346 June T., 1896. *Certiorari* to justice of the peace.

Opinion by WILSON, P. J. Filed September 7, 1896.

Phillip Kirby, the defendant in error, proceeded against C. L. Dawson, the plaintiff in error, a non-resident of the county, before Justice John B. Young, by attachment under the Act of July 12, 1842, to collect \$78.24 claimed to be due for wages for manual labor.

The plaintiff in error and the defendant below, brought up the record upon *certiorari* and assigned twelve specifications of error. Only a limited number of specifications will be considered, and most of those considered may be taken together. The third, fourth, fifth, sixth, seventh and tenth specifications are first considered. These all bear upon the service of the writ and the return thereof by the constable.

The Act of July 12, 1842, P. L. 845, under which the attachment issued in this case, provides as follows: "Section 28. Every such attachment shall be made returnable not less than two nor more than four days from the date thereof, and shall be served by the constable to

whom the same shall be directed by attaching so much of the defendant's property not exempt by law from sale upon execution, as will be sufficient to pay the debt demanded, and by delivering to him a copy of the said attachment and inventory of the property attached, if he can be found in the county, and if not so to be found, then by leaving a copy of the same at his place of residence with some adult member of his family, or the family where he shall reside, or, if he be a non-resident of the county and cannot be found, then by leaving a copy of said attachment and inventory with the person in whose possession the said property may be."

"Section 29. The constable shall state specifically in his return the manner in which he shall have served such attachment, and it shall be his duty to take the property attached into his possession, unless the defendant, or some other person for him, shall enter into a bond, with sufficient surety in the penalty of double the amount of the claim, conditioned that in the event of the plaintiff recovering judgment against him, he will pay the debt and costs at the expiration of the stay of execution given by law to freeholders, or that he will surrender up the property attached to any officer having an execution against him on any judgment recovered in such attachment."

The constable's return to the attachment reads as follows: "Served April 21, 1896. Attached the following named interests in the hands of Ben Dawson as the property of C. L. Dawson: Interest in the Erwin Oil Company, oil well fixtures and lease, located on the Bryan farm in Greene township, Beaver county, Pa. (Signed) W. D. Tallon."

The writ does not show a proper service. The return does not state whether or not the defendant was found in the county, or was a non-resident, or was served, nor does it state whether the property was taken into possession by the constable, or a bond taken as provided by the act, nor does the return state that a copy of the attachment and an inventory of the goods were left with the person attached, if found, and, if not so found, with the person in whose hands the goods were attached. The manner in which the attachment was served should be set out specifically in the constable's return as required by the act. It is not necessary to consider the other specifications of error.

It is necessary that the law should be complied with in order to give jurisdiction. The claim of the plaintiff below may be meritorious, and, being such, should be paid; but in order to take advantage of statutory remedies, such as the Act of July 12, 1842, known as the Non-Im-

prisonment Act, its provisions must be observed more closely than they were in the case under consideration.

The twelfth specification should not be passed without consideration. It states "that the interests alleged to have been attached are not such property as is meant and mentioned in the act."

In *Wolbert v. Fackler*, 82 Pa. 452, Justice THOMPSON says: "The 'property' intended by the act was not property in its more extensive meaning, it did not include real interests or incorporeal interests, but was defined by the act to be such as could be taken possession of by the officer and could be removed, either at the moment of attaching it, or at a proper time thereafter, and which he was required to remove, unless upon receiving security in double the amount of the plaintiff's claim. * * * The act evidently meant such as was capable of manual seizure and of manual surrender by the defendant or his bail."

The property attempted to be attached was an interest in an oil company, fixtures and lease. Were these interests, or was this interest, capable of manual seizure by the officer? It is a fair presumption from the record that the interest of defendant below was represented in said company, fixtures and lease by shares or stock. If so they partook of the nature of choses in action and could not be attached. If it were simply a lease, that was incapable of being attached; neither could an interest in a derrick, boiler and engine, etc., such things as are usually termed fixtures in oil operation.

Now, September 7, 1896, the proceedings and judgment are set aside and reversed.

For exceptions, *Frank H. Laird*.

Contra, *J. F. Reed*.

Orphans' Court.

In re Estate of JAMES H. LINDSAY, Deceased.

The statute of limitations has no application to a subscription to the stock of a corporation, where the delay beyond six years in calling it in, was the result of a corporate policy in which the subscriber united as director.

No. 73 June T., 1896.

HAWKINS, P. J.

STATEMENT.

This is substantially a proceeding to compel the payment of a subscription for four hundred shares of the par value of \$50 each, alleged to have been made in 1881 by James H. Lindsay, in the capital stock of the North Side Bridge

Company, a corporation organized under the Act of 1874. The so-called "subscription" was not in writing; and the only written evidence of its having been made was the certificate which the Act of 1874 requires shall be furnished the Governor as the basis for the grant of charters, signed by Mr. Lindsay. Upon the grant of the charter, as of October, 1881, the company was organized with James H. Lindsay and four others, who held all of the stock, as a board of directors. In January, 1883, Mr. Lindsay was elected president of the board, and continued therein until his death in September, 1884. In the meantime, January, 1882, the capital stock of the company was increased by \$400,000; \$200,000 of which was made preferred, and \$200,000 common, stock; March, 1883, a bid of \$650,000 for the construction of the bridge and the payment of land damages was made by N. M. McDowell, who was one of the incorporators and board of directors, and was accepted, payable \$250,000 in mortgage bonds, \$200,000 in preferred, and \$200,000 in common, new stock of the company. The mortgage bonds were not then in existence; but on June 10, 1884, the board, after expressing the "opinion" that the capital stock of the company "will not be sufficient to build the bridge," and that it was "desirable" the bridge "be pushed to early completion," authorized the issuance of \$250,000 mortgage bonds, payable in thirty years with interest; and these were issued accordingly. The bridge was completed, and was opened to the public January 1, 1885; and the consideration transferred. The earnings of the bridge seem to have been sufficient to pay running expenses, interest and dividends, until January, 1883, when a small loan was secured to supply a deficiency; and thereafter they gradually decreased until there was default in the payment of interest; and on December 14, 1895, all unpaid subscriptions to the capital stock, which included the four hundred shares standing in the name of James H. Lindsay, were called. Mr. Lindsay had paid nothing on his stock subscription. He had participated throughout in the direction of the affairs as a member of the board from the time of the organization of the company until his death. The court finds:

- (1) That J. H. Lindsay was a subscriber to the extent of four hundred shares of the original stock of the North Side Bridge Company at \$50 per share;
- (2) That no part of said subscription has been paid; and
- (3) That the delay in calling said subscription was the act of the board of directors of said company, including said James H. Lindsay.

The estate objects to the allowance of the claim because more than six years elapsed between the date of the alleged subscription and the demand for its payment.

ONINION. Filed January 9, 1897.

This case is clearly distinguishable from the *P. & C. R. R. v. Byers*, 32 Pa. 22, and its class upon which the defense relies. In those cases, by analogy to the statute of limitation, it was held that where the work which the organization contemplated had not been duly prosecuted, and no calls made within six years from the date of the subscription to the stock, a presumption of abandonment of the project arose in favor of the subscribers, which was a bar to recovery: *Allibone v. Hager*, 46 Pa. 48. The facts there justified the application of this principle; but in its statement the court was careful to add the qualification that this presumption was open to rebuttal. "If no cause for delay be shown," said the court in *R. R. v. Byers*, *supra*, "it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action." So it was said in *McCully v. R. R.*, 32 Pa. 25: "It is not to be questioned that acquiescence and assent would bind the defendant, or, rather would estop him from setting up the defense in question. That is to say, if there was evidence that McCully consented to the discharge of other subscribers, and the delay in commencing the road as a matter of corporate policy, which were not to effect his liability as a stock subscriber, he is estopped from alleging these matters of defense." So it was suggested in *Allibone v. Hager*, *supra*, that delay may be explained by the fact that the delinquent stock holder had consented. It by no means follows, said the court, that because the company has failed to call in a balance of a subscription the statute of limitation necessarily applies. "Calls may have been made and paid within six years—the delinquent stockholders may have been all the time directors, and receiving yearly profits. Nothing to the contrary of this appears, and it would be strange indeed, if in addition to this, the stockholders being directors, could, by a failure to call in the subscriptions from themselves, raise a bar in favor of themselves."

Here it is true more than six years elapsed between the dates of subscription and call; but these distinguishing characteristics appear:—

(a) There was no question of abandonment of work, for that was admittedly finished within the time required; and

(b) Mr. Lindsay, in addition to the relation of subscriber, bore that of consenting director of

the company and bring the present case within the suggested qualification of the general rule.

It is insisted that as an individual member Mr. Lindsay was not responsible for the action of the board. That might possibly have been available as a defense had he entered a protest; but by his active participation he made himself a party to the corporate policy of postponement which the board adopted. The issuance of mortgage bonds, at least to the extent of the original capital stock, while it cannot be justified,—for there can be no possible justification,—is explicable on no other theory than an intent to postpone for the thirty years during which they ran, or, it may be, indefinitely, payment of the subscription. It is absurd therefore to say that because he could not have prevented delay, the principal of estoppel has no application to his individual liability. He made no attempt in fact to prevent; but by his official concurrence, contributed to delay; and it would be strange indeed if, when unexpected necessity arose for the payment of the obligation which temporarily relieved him from the payment of his subscription, he may stultify his official action for his individual benefit. A similar defense was made and deservedly failed in *Hays v. R. R.*, 38 Pa. 81. Objection having been made by the defendants, one of whom was a director, to the admission of the books of the corporation on the ground of their defective character, the court said: "How can these defendants be permitted to deny that the directors fixed the amount of each call, and the time and place of each payment, when the calls were made by one of themselves? If these particulars of the call should have been spread upon the minutes, whose fault is it that they were not? Can these defendants relieve themselves from liability, by setting up their own failure to keep proper minutes? Shall they be permitted to say that the calls under which they required payments from other subscribers are insufficient to charge them? May they do this in face of the fact that they recognized their sufficiency by making partial payments upon each of the installments? We cannot return an affirmative answer to these questions. Whatever others might do, it is not for these defendants to say there was no adequate proof that the calls were duly made." The principle of that case is equally applicable here. It is immaterial that Mr. Lindsay's action was clad in corporate garb; it necessarily implied waiver of demand of his subscription. He could not ignore nor discredit as an individual what he had officially sanctioned. If there were laches

in corporate action, he was a party, and could not take advantage of his own wrong; if a corporate policy of delay was adopted, he was equally a party and could not repudiate them for his individual benefit without stultification. And when in addition to this, it is considered that he maintained his official position from the time of the organization of the company until his death by means of this stock, and participated in the profits, it is plain that repudiation of his subscription, without even an offer to surrender the stock, has not a semblance of justification.

Legal sanction aims to realize moral justice; and of the moral duty of this estate to pay Mr. Lindsay's subscription there is no shadow of doubt. It follows that the bridge company's claim must be allowed.

For claimant, *H. & G. C. Burgwin.*

For estate, *W. B. Rodgers and J. J. Miller.*

In re Estate of HANNAH BOWERS, Deceased.

A testator who is not competent to make and to digest all the parts of a contract, by reason of age, sickness or extreme distress or debility, may yet be competent to direct the testamentary disposition of his property.

No. 298 Sept. T., 1896. Appeal from the probate of will.

HAWKINS, P. J.

STATEMENT. Filed December 24, 1896.

Mrs. Hannah Bowers died in July, 1896, leaving a will dated January 2, 1896, by which after providing for the payment of debts and the conversion of real estate she divided the residue into six equal parts, of which she gave one to each of her five children, and in respect of the other sixth she created a spendthrift trust for her son Joseph during life, and at his death gave the remainder to his brothers and sister absolutely. The reasons as developed at the present hearing for discriminating against Joseph seems to have been suggested by the fact that he had purchased real estate on time, and on default had been sold out at sheriff's sale. The witnesses to the will had not known Mrs. Bowers before, but subscribed at her request and in the presence of herself and two of her sons. One of these sons afterwards died, and the surviving children unite in asking that the will be set aside upon the ground of *senile dementia*; and the trustee designated by the will for Joseph resists the application in obedience to its duty. The main reasons given by one of the sons, who was called as a witness for his opinion that his mother was incapable of making a will, was that she had on one occasion failed to take his advice in reference to the disposition of her real

estate. Another witness relied upon her refusal to answer his question as to her confidence in her spiritual welfare. And still other witnesses gave reasons equally unsatisfactory.

The material facts adduced by the contestants are these:

At the date of the will Mrs. Bowers was in her eighty-fourth year, with her faculties much impaired. Her vision was dimmed, and her hearing dulled. She failed to distinguish the voices of her sons. One meal would scarce be finished when she would begin preparation for the next; and in the middle of a bright afternoon insist upon the lamp being lighted. From having been tidy, she became unconscious that her person was in a filthy condition, and became slovenly in her manner of eating. And on the day before the execution of the will she forgot that an occasional visitor had been in her room within half an hour.

On the other hand the contestants' testimony also shows that Mrs. Bowers had a clear understanding of her property; and that her failure to recognize her sons was owing mainly to impaired vision and hearing. When the names of her sons or of friends who visited her were mentioned she at once evinced recognition; and generally made intelligent response to questions or remarks. It is scarcely credible that her two sons, who were successively her business agents and advisors, would have sanctioned by their presence the making of the will if they had at the time thought her incapable; and as corroborative of intelligence implied by the execution was her voluntary declaration made three months afterwards that she had by will created a trust for the protection of Joseph from his creditors. A year or so before the date of the will she had conveyed two lots to two sons, but afterward insisted on reconveyance; and in the fall of 1895, when urged to send for her daughter, hesitated a long time on account of the expense. She kept a firm grasp of her property to the last.

This being the character of contestants' evidence, the question arises whether or not Mrs. Bowers had sufficient capacity to make a will.

The recognized test in such cases is the possession of mind sufficiently strong to enable the testator to know of what his property consists, and to decide who shall be the objects of his bounty. "Neither age, nor sickness, nor extreme distress or debility of body," said the Supreme Court in *Wilson v. Mitchell*, 101 Pa. 495, "will effect the capacity to make a will, if sufficient intelligence remains. The failure of memory is not sufficient to create the incapacity unless it be total, or extend to his immediate

family or property. The want of recollection of names is one of the earliest symptoms of the decay of memory." A testator "may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make, and to digest, all the parts of a contract, and yet be competent to direct the disposition of his property by will. This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing; more especially in such a reduced state of mind and memory, he may be able to recollect and to understand the disposition of his property which he had made by a former will, when the same is distinctly read over to him:" *Ibid*.

Tested by this definition, Mrs. Bowers had undoubted capacity to make the will propounded here. She knew the subjects and objects of her bounty. In *Wilson v. Mitchell*, *supra*, although contestant's case was much stronger than here, it was held that the court below was right in withdrawing it from the jury. "Dougal (testator) had lived over one hundred years before he made the will; and his physical and mental weakness and defect of memory were in striking contrast with their strength in the meridian of his life. He was blind; not deaf, but hearing impaired; his mind acted slowly, he was forgetful of recent events, especially of names, and repeated questions in conversations; and sometimes, when roused from sleep or slumber, would seem bewildered. It is not singular that some of those who had known him when he was remarkable for vigor and intelligence, are of opinion that his reason was so far gone that he was incapable of making a will, although they never heard him utter an irrational expression." In that case half of the estate was given to strangers in blood; while here five of the children receive the share which they would have received under the intestate law; and the sixth a qualified interest for reasons which his own conduct had suggested, and was deemed sufficient by testatrix. As the evidence was held insufficient to justify submission to a jury there, the contestants here have failed to make out a *prima facie* case, and an issue must be accordingly refused.

For will, *James S. Young*.

For contestants, *J. S. & E. G. Ferguson*.

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PITTSBURGH, PA., FEBRUARY 3, 1897.

Supreme Court, Penn'a.

HAYS v. HAYS.

A. deeded land without consideration to his wife B., who executed a mortgage to A.'s son C. At the time B. did not read the papers and thought she was getting a life estate with remainder to the son. Some years later in settlement of a controversy between them A. agreed that B. should have this property in fee-simple. *Held*, that these facts do not affect C.'s rights, and he is entitled to foreclose his mortgage on the death of B.

In the above case the son knew of the terms of the settlement between A. and B. and assented to them, but it appeared that at the time he did not understand what his rights were, and did not know that he had an interest in the mortgage. *Held*, that he is not estopped from claiming his rights under the mortgage. The estoppel lacks an essential element, namely, a knowledge of his rights on the part of the person to be estopped.

Appeal of A. C. Hays and Harry J. Hays, defendants, from the decree of the Court of Common Pleas No. 3, of Allegheny county, upon a bill in equity filed by Adda L. Hays (now Cochran) for the purpose of having decreed null and void a certain mortgage dated December 15, 1877.

The mortgage in question was recorded in the Recorder's office of Allegheny county, May 16, 1892, in Mortgage Book vol. 613, page 445, conveying property known as 41 Chatham street, in the city of Pittsburgh, Penna., to secure a debt of eight thousand dollars (\$8,000), alleged to be a balance of purchase money payable in two years from date, with interest, executed by the plaintiff, Adda L. Hays, and her then husband, A. C. Hays, one of the defendants, to J. H. White, and by him assigned to the defendant, A. C. Hays, in trust for the other defendant, Harry J. Hays, and for the purpose of having the said plaintiff decreed to be the owner in fee-simple of the said property, clear of all encumbrance.

The original plaintiff, Adda L. Hays, died February —, 1896, having made her last will and testament, dated August 23, 1891, by which she devised the property in question to her two sisters, Kate Cochran and Riller Cochran, who were on February 16, 1896, substituted as plaintiffs in the case.

A. C. Hays, by deed dated December 15, 1877, conveyed the property involved in this contro-

versary to his attorney, J. H. White, who at the same time conveyed the same in fee-simple to the plaintiff, Adda L. Hays, then wife of A. C. Hays. At the same time like conveyances were made of a farm situated in the State of Iowa, the purpose of the transaction at the time being, as alleged by A. C. Hays, to make proper provision for his wife while in condition to do so. At the same time two other papers were executed by Adda L. Hays and her husband, the purpose of which at the time was, as alleged, to secure to the wife a life estate in the properties conveyed, and at her death an estate in fee to Harry J. Hays, the other defendant, a son of A. C. Hays by a former marriage, the papers being called deeds or declarations of trust. It subsequently, however, transpired that they were mortgages, one being the mortgage in question in this case, and the other a similar mortgage on the Iowa property to secure a debt of five thousand dollars (\$5,000), and it is claimed by the plaintiffs that in securing the execution of these papers A. C. Hays perpetrated a fraud upon his wife in representing that the mortgage in question, which was for the full value of the property, was a deed of trust, and that this fraudulent misrepresentation renders the mortgage null and void. Subsequently, by deed dated August 15, 1879, the defendant, A. C. Hays, and the plaintiff, Adda L. Hays, his wife, conveyed the property in question to Henry A. Davis, who, by a deed of same date, conveyed a life estate therein to Adda L. Hays, and by deed of same date the remainder to Mary E. Helvie, and at the same time Adda L. Hays released her dower interest and other rights in other property of A. C. Hays.

By proceedings in equity at No. 24 September Term, 1881, Court of Common Pleas, No. 1, of Allegheny county, Mrs. Adda L. Hays bought to have set aside the various releases and conveyances of her interests in her husband's property, as before stated, claiming they were fraudulently obtained, and to have her material rights therein declared and her title to that portion specifically conveyed to her established. A complete settlement of this cause was effected in September, 1884, by which she relinquished her marital rights and other rights or claims in certain of her husband's properties, and received a deed of conveyance in fee of the Chatham street house, the property in question in this case. This settlement, while made with A. C. Hays, was directly encouraged, aided and promoted by Harry J. Hays, the other defendant.

The court below held that the evidence showed that the mortgage was obtained by misrepresentation, and in any event, that the subse-

quent settlements were made with the knowledge of Harry J. Hays and to some extent, with his acquiescence, and that for these reasons a decree should be entered directing the satisfaction of the mortgage.

For appellants, *John F. Cox* and *J. McF. Carpenter*.

Contra, *A. M. Brown* and *J. M. Stoner*.

Opinion by MITCHELL, J. Filed January 4, 1897.

The complainant's bill states the original transaction as the gift of the house by her husband to her for life and her own testimony as well as that of her husband agree with the averments of the bill that after her death the property was to go to appellant, Harry J. Hays. But the bill further states her objection that at the time of the conveyance she was induced to sign a paper by the representation of her husband that it was a deed of trust "intended to keep the property in his own family after her death and secure the transmission of the title to the remainder therein to his son, the defendant, Harry J. Hays," whereas it was a mortgage by her as the holder of the title, to a trustee for the benefit of the said Harry J. Hays, whereby, as she subsequently learned, she was "deceived and defrauded."

To call such a transaction a deception is to use highly exaggerated language, but to consider it a fraud is a misapplication not only of words but of substantial principles. Complainant was a mere volunteer, and as a donee she was bound to take the gift on the terms imposed by the donor. The best and simplest conveying to accomplish the undisputed purpose would have been a deed to White as trustee for her during life and remainder to Harry in fee, or a deed to White and a deed by him to her for life with remainder to Harry. The donor chose to have the deed from White to complainant in fee and have her make a mortgage in trust for Harry. Except for an equity based on the donor's intention that she should not be disturbed by the mortgage during her life, there was no substantial difference to her in the method. But even if there had been, the donor had a right to change his mind, and if she had objected, the only consequence would have been the accomplishment of the same result in another way, or the failure of the gift altogether. But further than this, even if she had been a purchaser for value, she would have had no equity against the mortgage except to be undisturbed by it during her life; and no such injury was alleged or proved in the case. There was no fraud in the giving of the mortgage, and

by her own statement the complainant had no equity of any kind, on the original transaction.

As to the subsequent settlement the complainant stands on different ground. By that she relinquished her rights in the property of her husband, and as to him she was therefore a purchaser for value. But although appellant was a voluntary donee of the mortgage, yet the gift was executed and his estate in remainder could not be divested by any agreement between his father and his stepmother to which he was not a party, except by estoppel. Of this there is no sufficient evidence. The claim rests mainly, if not entirely, on the testimony of Major Brown as to what took place between himself and the appellant at the time the latter became a witness in the litigation between his father and the latter's wife. Appellant was sought as a witness in the divorce case, and Major Brown out of sympathy was rather reluctant to call him against his father, but found him possessed of knowledge of important facts and "willing to tell the truth," and in so doing to help his stepmother. Then, continues Major Brown, "I talked to him in my office privately and confidentially over the whole subject, and communicated to him the proposed settlement by which she was to get this house and to relinquish all other rights, and in fact I told him everything about it. He showed willingness to testify in the divorce case. * * * He expressed unqualified satisfaction that she was to get that house, and seemed to think it was too little. * * * Of course I arranged that settlement without consulting him, with my own client." This is the whole substance of the testimony on this point, and standing alone it would be meagre to divest an estate. But its weight is materially lessened when considered in connection with the circumstances. The conversation, it will be observed, was in reference to the divorce case, and the question of property was altogether incidental to that. The mortgage was not mentioned expressly, and it was certainly not prominent in Major Brown's mind if indeed he knew of it at all. In answer to the question whether this mortgage and its validity was one of the mooted questions in the equity case, he said: "It seems to have been, although it was not touched upon in testimony when I was present, it unquestionably was involved among the other transactions." There is no evidence that appellant had any reason to suppose that the settlement communicated to him affected his own rights. He was a young man, just under or over twenty-one. His age does not appear exactly, but he testified that in December, 1877, when the deed to complainant and the mort-

gage were made, he was between fourteen and fifteen years old, so that in December, 1884, when the settlement was executed, and this conversation was before that, he was certainly under twenty-two and probably under twenty-one. Not only was he not informed of his rights or of the possible effect of the proposed settlement on them, but he was actually misled by previous information from complainant herself that he no longer had any interest in the property as his father had taken it away from him and given it to Cora Helvie. One of the weightiest elements in estoppel, knowledge of his own rights in the subject-matter was therefore absent, and there is no other ground on which complainant could base any equity against appellant.

Decree reversed and bill dismissed with costs.

CITY OF ALLEGHENY v. PITTSBURGH, ALLEGHENY & MANCHESTER PASS. RY. CO.

The defendant, a passenger railway company, by the terms of its charter was to declare dividends "of so much of the profits of said company as shall appear advisable to the directors thereof," but in no case to exceed the net profits of the company; it also provided that it should pay to the city of Allegheny a certain percentage of the "dividends declared." The city of Allegheny gave its consent to the occupation of the streets upon condition of the payment of the tax upon the "dividends declared." Subsequently the stockholders in the defendant company exchanged their holdings for stock in another railway company in the city of Allegheny, eight shares of the latter company being given as the equivalent of one share in the defendant company. The city claimed that the transaction was in effect a stock dividend, and as such taxable by the city under the defendant's charter. *Held*, that it amounted only to a change of ownership of the same property and was neither in form nor substance the declaration of a dividend which could be taxed under the provisions of the defendant company's charter.

Appeal of the City of Allegheny, plaintiff, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* brought by it against the Pittsburgh, Allegheny & Manchester Railway Company.

This was an action brought to recover a certain sum alleged to be due to the plaintiff by the defendant upon the declaration of a dividend. On the trial, before J. W. F. WHITE, J., the facts appeared as follows:

The defendant railway company was incorporated by special Act of the Legislature, and authorized to construct and operate a passenger railway in the cities of Pittsburgh, Allegheny and the borough of Manchester, after obtaining the assent of the municipal authorities thereto. The twelfth section of the act was as follows:

"That the said company shall pay into the treasuries of the city of Pittsburgh and Allegheny, and the borough of Manchester, in sums proportioned to the length of said road within the corporate limits of each of said cities and borough, for and during the first five years after they commence running cars upon said road, twenty dollars per year for each car, and three per cent. of the dividends declared; for the second period of five years, thirty dollars per year for each car and five per cent. upon all dividends declared, and thereafter the sum of forty dollars per car and five per cent. of the dividends declared."

The city of Allegheny by ordinances granted to the defendant the right to construct and operate a street railway upon a number of streets upon certain conditions, among which was the payment of a five per cent. tax on all dividends declared by said company. The terms and conditions of said ordinances were duly accepted by the defendant.

In July, 1889, the stockholders of the defendant company entered into an agreement to lease its property and franchises to the Pittsburgh, Allegheny & Manchester Traction Company, for a term of 999 years. At the same time a written request was made by the said stockholders to the said traction company to increase its capital stock from \$5,000 to \$3,000,000 and agreeing to subscribe for said stock and pay for the same with the stock of the defendant company at the rate of one share of defendant company's stock for eight shares of the traction company stock. This arrangement was consummated. The shares of stock in the two companies were of the same par value. The city claimed that the transaction was in effect a stock dividend and as such taxable under the ordinance aforesaid.

In the course of the trial it was developed that the defendant company had, after the lease was made, sold certain real estate and divided the proceeds among its stockholders. It was conceded that the defendant under the said ordinances was liable to a five per cent. tax on the same, which amounted to \$2,021.53.

The court in its charge, after discussing the question before it, instructed the jury as follows:

"I therefore say, in conclusion, that your verdict should be for the amount agreed upon by counsel, for the dividends for the property sold after this lease was made, which was not embraced in the lease; and I instruct you that the plaintiff is not entitled to recover on the other ground of action, claimed in this case.

Verdict for plaintiff for \$2,021.53, and judg-

ment thereon. Plaintiff took this appeal, and assigned for error the above quoted instruction and the entry of judgment upon the verdict.

For appellant, *Elliott Rodgers, D. F. Patterson, Joseph A. Langfitt and George Elphinstone.*

Contra, D. T. Watson and A. M. Nepper.

Opinion by MITCHELL, J. Filed January 4, 1897.

The passenger railway company, appellee, was chartered by the special Act of April 12, 1859, by the provisions of which it was to declare dividends "of so much of the profits of said company as shall appear advisable to the directors thereof," but in no case to exceed the amount of the net profits of the company. By the twelfth section of the act, the company was required, *inter alia*, to pay to the city of Allegheny a certain percentage "of the dividends declared." The city of Allegheny by ordinance gave its consent to the occupation of its streets upon the same condition of the payment of the tax upon "dividends declared." The question in the present case is whether the transaction by which the railway company was leased to the traction company and the stockholders exchanged their holdings of stock in the former for stock in the latter, assuming all these matters to have been parts of the same transaction, was equivalent to the declaration of a dividend by the railway company, on which a tax would be due under the charter and ordinance.

It is not necessary at present to discuss the argument of the appellee that only cash dividends are taxable under the charter. If that was the legislative intent the question would still arise whether any distribution of profits, equivalent to cash, could be made among the stockholders in any form, or by any name, so as to escape taxation. It is sufficient to say that there is no evidence here to warrant a jury in finding any device for such purpose.

The tax is not on par value, or market or actual value of stock, nor on profits earned, but on dividends declared. A dividend as defined by Webster's Dictionary (1893), is "the share of a sum divided that falls to each individual, a distributive sum, share or percentage, applied to the profits as apportioned among stockholders." It differs from profits in being taken by competent authority out of the joint property of the partnership or company, and transferred to the separate property of the individual partners or stockholders. No safely conducted business, corporate or other, distributes all its earned profits. There must be a fund reserved for contingencies, for repair or renewal of deteriorated material, etc., and the amount, absolute or pro-

portionate, to be held for such purpose must be determined by the authority which conducts the business. The power to control this matter is necessarily implied in all authority to make dividends, and in the present case it is expressly vested in the directors, who are to declare such dividends as "shall appear advisable" to them, not exceeding net profits. The words "dividends declared" therefore have a substantial and settled meaning, and it is upon such dividends only, and not as already said on par or market value of stock or on profits earned, that the tax is laid.

Continuing to regard all that was done by both corporations and stockholders as parts of a single transaction, as that is the aspect most favorable to the appellant, what was it in substance?

First, as to the stockholders individually, it was an exchange of their holdings in the railway stock, for holdings in the traction stock, at the rate of one to eight.

The shares held by each stockholder were his individual and separate property. He could have sold the railway shares at \$20, which was the market price, and bought traction shares at 40, also the market price, and would have then stood just where he stands now, with a change of his property from one form to the other in the ratio of one to eight, yet it would have been his own private act with which neither the company nor the other stockholders could have interfered, or for which they would have been responsible. The nature of the act was not changed by the fact that all the stockholders did it, whether separately or in pursuance of an agreement in which all joined. In either case it was still the individual act of each in his own right.

Secondly, as to the companies. The traction company acquired the stock of the railway company which under its charter it had power to do. It might under such power have gone into the market and bought railway stock at \$20, and sold enough of its own stock at 40 to pay for the other. Instead of the acquisition being made thus by separate purchase and sale of the two stocks, it was done by direct exchange between the owners. The nature of the transaction was not changed thereby. It was a transfer of property from one owner to another, and the personality of the purchaser or seller did not change its substantial character. Then as to the railway company, its stock has changed holders, and that is all. The shares are all in existence just as they were before, but instead of being owned by numerous individuals they are held in one hand, in fact they are a valuable corporate asset of the traction company and are

pledged as collateral security for its bonds. As regards the railway company, with reference to which the tax is to be considered, there was no distribution or change of what had been the joint corporate property, into the separate property of the individual stockholders. The whole transaction was a change of ownership of the same property, and neither in form nor in substance the declaration of a dividend.

The cases chiefly relied upon by the appellant, *Matson's Ford Bridge Company v. Com'th*, 117 Pa. 285, and *Com'th v. Telegraph Co.*, 15 W. N. C. 881, are not applicable. In both of them the tax was upon the value of the capital stock and not on the dividends which were mere measures of such value, and in both of them there had been in fact a severance of earnings or profits from the mass of the corporate property and a distribution of them among the stockholders as individuals, which is the essential character of a dividend.

A distinction was raised in the argument here between the transaction as regards the exchange of stock by the holders in the railway company and the transfer to the traction company of the 1409 shares of the Union Passenger Company. The latter were held by trustees, but under what title or upon what terms does not precisely appear. The distinction was not made in the plaintiff's statement, nor at the trial, and there is no assignment of error raising it specifically in this court, the plaintiff's claim being made upon the entire transaction as single and involving a tax upon the whole. It appears inferentially in the argument and in some of the evidence that these shares of the Union Company were part of the general assets of the appellee, and that in the arrangement they were transferred to the traction company in consideration of the issue of additional shares of its stock to the holders of the shares of appellee. If such was the fact it would seem to be a severance of these shares from the corporate property of the appellee, and a distribution of their value or equivalent among the stockholders individually, and therefore a dividend, taxable unless the legislative intent was to restrict the tax to cash dividends only, an intent that could hardly be presumed and the burden of proof of which would be upon appellee. But if this were the real state of the facts there would be no difference except the question of cash dividend between the distribution of the proceeds of this Union stock and the proceeds of the sale of the real estate, etc., as to which the learned judge below directed the jury to assess the tax. It would not be safe for us to assume that his including one and excluding the other was the

result altogether of not having his attention called to the latter. We must presume that the facts before him did not warrant him in putting both on the same footing. The facts if fully developed may, however, be so, and in affirming the judgment, therefore, we do so with leave to the court below to open and reconsider it upon this point should the facts and the law make it just and proper to do so.

Judgment affirmed.

[See next case.]

**CITY OF ALLEGHENY v. FEDERAL STREET
& PLEASANT VALLEY PASS. RY. CO.**

The defendant company, a passenger railway, consolidated with two other street railways. The defendant's stock was worth per share ten times as much as the stock of one and five times as much as the stock of the other street railway, and in order to obtain a convenient divisor of the consolidated stock the defendant company increased its capital stock and new stock was issued in proportion of ten shares to each one of the defendants; two for each one of the second company and one for each one of the third company. By defendant company's charter it was to pay to the city in which its lines were laid a certain percentage upon the dividends declared from "so much of the profits of the company as shall appear advisable to the directors." Held, that the increase of the stock of the defendant company was a nominal and not an actual increase in the value of the stock, and that such increase was not a stock dividend upon which, by the terms of the defendant's charter, the city could levy a tax.

Appeal of the City of Allegheny, plaintiff, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* brought against the Federal Street and Pleasant Valley Passenger Railway Company to recover a tax on dividends.

At the trial, before J. W. F. WHITE, J., it appeared that the defendant company had, by various ordinances of the city of Allegheny, obtained permission to lay tracks in said city on condition, *inter alia*, that it pay to said city five per cent. on all dividends declared. The Peoples Park Passenger Railway Company and the Observatory Hill Passenger Railway Company obtained leave to exercise their franchises in the said city on the same terms as governed the permission to the defendant. The other facts appear in the opinion of the Supreme Court.

The court instructed the jury that its verdict ought to be for the defendant. Verdict accordingly and judgment thereon. The plaintiff took this appeal and assigned as error the above instruction of the court.

For appellant, *Elliott Rodgers, D. F. Patterson, Joseph A. Langfitt and George Elphinstone.*
Contra, D. T. Watson, W. B. Rodgers and Stone & Potter.

Opinion by MITCHELL, J. Filed January 4, 1897.

The principle upon which this case must turn is the same as that in *City of Allegheny v. Pittsburgh, Allegheny & Manchester Pass. Ry. Co.* [ante, p. 241], opinion filed herewith. Both were actions of *assumpsit* for a tax on dividends. In the present case the appellee was a passenger railway company chartered by special Act of February 20, 1868, P. L. 187, with capital stock of two thousand shares at par of twenty-five dollars, but with power of indefinite increase, and in 1889 it had been increased to four thousand shares. In 1889 consolidation with two other roads having been determined on, the capital was further increased to one million dollars, or forty thousand shares of the same par value. The object of this was two-fold. As the law was then understood, the capital stock of consolidated companies was not permitted to exceed the authorized aggregate capital of the individual companies in the consolidation. The proposed consolidation in this case included the appellee with a capital of one hundred thousand dollars, the People's Park Company, also with a hundred thousand dollars, and the Observatory Hill Company with two hundred thousand. But the appellee's stock was worth per share five times as much as the Observatory Hill, and ten times as much as the People's Park, and a consolidation in the ratio of their nominal capital would not have represented their actual relative values. To obtain a convenient divisor of the consolidated stock, therefore, the appellee increased its shares to forty thousand, representing a capital of one million, and the new stock was issued in the proportion of ten shares for each one of appellee's, two for each of the Observatory Hill's, and one for each of the People's Park's, thus preserving the proportionate value of each to the others, without infringing the law. An Act of May 13, 1889, P. L. 205, passed while this consolidation was in course of preparation relieved the necessity of this increase of stock, but the second reason for it, the convenience of distribution of the new stock remained and the plan was carried out. For each share in the old Federal Street and Pleasant Valley Company the holder received ten shares of the new consolidated corporation. It is this increase in the number of shares which the appellant claims as a stock dividend liable to tax. Referring now to the definition of a dividend, as discussed in *Allegheny City v. Pittsb., All. & Man. Ry. Co.*, supra, it is plain that the substantial characteristic is wanting. There has been no severance of any property from the common fund of the

corporation, and no distribution of it as the property of the shareholders individually. The new corporation has the same property the old one had before, no more and no less from this source, and the shareholder had his interest in the same proportion of the corporate whole, although his shares are numerically increased. It was as if the owner of land with a frontage of two hundred feet, divided it into lots of twenty feet each. He has no more land, though he nominally has ten lots instead of one, and though the division may increase the facility of sale or rental. It was held in *Com'th v. Pittsb., Ft. W. & Chicago Ry. Co.*, 74 Pa. 83, that a nominal or arithmetical increase of shares, without transferring to the stockholders anything out of the treasury or property of the corporation, is not a dividend. That is all there was in this transaction.

It is of course conceded that if the increase of shares was cover for distribution of accumulated profits it would not be available to escape taxation. But there is no presumption that an increase is a dividend, that is a question of fact for the jury with the burden of proof on the party alleging it: *Com'th v. Erie & Pittsb. R. R. Co.*, 74 Pa. 94. In the present case the learned judge below said there was "no evidence that the increased number of shares was in consequence of any earnings or profits made by the defendant company," and no attempt has been made to show that he was in error as to that fact.

Judgment affirmed.

[See preceding case.]

HARTZELL'S APPEAL.

A petition was presented in the Orphans' Court by the executor of an estate for a rule to show cause why the owner of land devised to one of the devisees under the will and from whom he was a purchaser, should not pay the executor a certain sum charged on the land under the will or show cause why the money should not be levied upon and collected of the said land upon which it is charged. Held, that as under the 59th section of the Act of 1834, the jurisdiction to enforce a legacy charged on land is vested in the Orphans' Court, and as the form of remedy is by bill or petition of the legatee, the petition of the executor was properly dismissed for want of jurisdiction.

Hart v. Homiller, 20 Pa. 248, and *Hart v. Homiller's Ex'r*, 23 Id. 89, distinguished.

Appeal of George M. Hartzell, executor of George Hartzell, deceased, from the decree of the Orphans' Court of Westmoreland county, dismissing his petition for a rule on John G. Ruoff, appellee, owner of land devised to Lewis H. Hartzell, to show cause why he should not pay to petitioner \$2350, charged on said land under the will of George Hartzell, deceased, or to show cause why the \$2350 valuation money

should not be levied upon and collected out of the said land upon which it is charged.

A rule was granted as prayed for. To this an answer was filed by John G. Ruoff, denying the jurisdiction of the court, and his liability to pay. The court dismissed the petition of George M. Hartzell, executor, on the sole ground that the executor was not the proper party to present the petition, invoking the aid of the court in collecting the money charged on the land as aforesaid. From which decree George M. Hartzell, executor, took this appeal.

For appellant, *George S. Rumbaugh, Paul H. Gaither and Cyrus E. Woods.*

Contra. *Vin. E. Williams, A. M. Sloan and W. A. Griffith.*

Opinion by MITCHELL, J. Filed November 9, 1896.

The 59th section of the Act of February 24, 1834, P. L. 84, vests the jurisdiction to enforce payment of a legacy charged on land, in the Orphans' Court, and the form of the remedy is by bill or petition by the legatee. The cases on this act are uniform and emphatic that the jurisdiction of the Orphans' Court is exclusive. In the late case of *Brotzman's Appeal*, 119 Pa. 645, it was so held, although there were questions of the sufficiency of provisions for complainant's support, and the deprivation of privileges in the homestead, which are usually and most conveniently enforced by bill in a court of general equity jurisdiction.

The cases are equally emphatic that the form of remedy prescribed by the act must be pursued, and the petition filed by the legatee (or legatees jointly where there are more than one), and they might be considered as equally uniform except for *Hart v. Homiller*. This was twice before the court. The first time, reported in 20 Pa. 248, was an action of ejectment by the legatees against the second vendee of the land charged. The jury were instructed that the ejectment could be maintained in lieu of a bill in equity, and plaintiffs recovered a verdict, to be released on payment of the sum charged, with interest. On the merits of the case, that the land was still subject to the charge in the hands of the sheriff's vendee of the interest of one of the heirs, and that the vendee did not purchase the interest of the heir in the sum charged, but only his interest in the land, this court was with the plaintiff, but reversed the judgment on the ground that the jurisdiction was in the Orphans' Court. This was all that the case really decided, but in delivering the opinion, LOWRIE, J., said: "This form of action cannot be sustained, and the executors, not the

legal heirs, are the proper plaintiffs." Thereupon the executor filed a petition in the Orphans' Court, and the case came up again as *Hart v. Homiller's Executor*, 23 Pa. 39. The plaintiff in error made the objection that the legatees and not the executor were the proper parties to institute the proceeding, but in the opinion, also by LOWRIE, J., no notice was taken of this point, and the money was ordered to be paid to the executor.

The case, therefore, as it stands, is authority for the present proceeding, and we must inquire how far it is consistent with subsequent decisions. That it is contrary to the literal wording of the statute is plain, and the disposition of the court has been to adhere closely to the express language of the act.

In *Conrad's Appeal*, 38 Pa. 47, the testator charged an annuity to his widow, on the residuary estate, consisting partly of ground rents. One of the latter was paid off, and the executors received the money and included it in their account. The court below awarded the whole residuary estate to the executors as a trust for the payment of the annuity, but this court reversed the decree, and, rather notably, speaking again through LOWRIE, C. J., said: "By the common law, executors had nothing to do with legacies expressly charged on land, or that by deficiency of personal estate, became charged on the residuary real estate; and this is not changed by the system created by our Acts of Assembly. It is only in equity that such legacies were enforced in England; and with us they are enforced only in the Orphans' Court, on petition by the legatee against the owners of the land charged, with notice to the executors and such others as may have any interest. We know not how we can treat this annuity in any other way. It is a legacy in lieu of dower, and becomes a charge by reason of a deficiency of the personal estate. This absolves the executors from all duty in relation to it."

In *Field's Estate*, 36 Pa. 11, this court again said: "There was error also in bringing the suit in the name of the administrator with the will annexed. It is the duty of the executors or their substitutes to discharge legacies so far as funds come to their hands. For deficiencies the legatees must proceed themselves against the devisees, or their assigns, whose land is charged with the payment. We know of no law authorizing the executors to attend to this duty," citing *Conrad's Appeal*.

In *Baker's Appeal*, 59 Pa. 315, it was held that the legatees, if more than one, could join in the petition, and that the executors should be made parties, "though they may not petition

for the payment of the legacies." To the same effect also is *Knecht's Appeal*, 71 Pa. 333, where it was held that the executor is a proper party defendant, but where the parties being in court, though on a petition informal in its mode of statement, the informality was not substantial and could be amended.

In *Weiler's Estate*, 189 Pa. 66, the money appears to have been ordered to be paid to the administrator *d. b. n. c. t. a.* to become part of a fund in court for distribution, but the form of petition or parties petitioning do not appear, and the question of practice was not raised or discussed.

These cases are all subsequent to *Hart v. Homiller*, and while not disturbing the principle of that decision, must be accepted as establishing a different practice. In some respects the action by the executor is the more convenient remedy, especially in cases like the present, where the testator has directed something to be done (*i. e.*, the several sums to be added together and after deducting costs, to be divided), and has not said by whom. But as already said, the clear trend of the court has always been to adhere closely to the directions of the statute not only as to the tribunal but also as to the form of the remedy, and it is not now desirable to begin a departure from it. The decree will therefore be affirmed, but as the merits of the case are clearly with the legatees, the court below may, if the interests of justice should appear to be served thereby, restate the petition and permit the legatees to come in upon it as parties plaintiff.

Decree affirmed, costs to be paid by the appellant.

RIVERTON FERRY COMPANY v. McKEESPORT & DUQUESNE BRIDGE COMPANY.

Where a ferry company, incorporated under the general Act of 1874 and supplements, and although without exclusive or other special charter rights, has one of its landings appropriated by a bridge, since incorporated, and where the ferry-boat's passage across the river is obstructed by a pier of the bridge, the ferry company is entitled to damages, other than nominal, *i. e.* for loss of its earnings sustained by reason of such appropriation and obstruction.

It is not entitled to an injunction against the bridge company when it allows expenditure of much money by the latter before moving to restrain, being thereby guilty of laches.

Plaintiff's bill alleged that the bridge was built on the exact line of the ferry, and the evidence did not show this, but that it was built across the ferry's line, only partially obstructing its route of passage.

Bridgewater Ferry Co. v. Sharon Bridge Co., 145 Pa. 404, explained.

Under the evidence in that case and in this, loss resulting merely from competition is not the subject of redress.

Appeal of the Riverton Ferry Company, plaintiff, from the decree of the Court of Common Pleas No. 2, of Allegheny county, upon a bill in equity filed against The McKeesport and Duquesne Bridge Company.

Plaintiff's bill sets forth that the ferry company was incorporated in 1883 to maintain a ferry across the Monongahela River in Allegheny county, from a point at or near the foot of Riverton street, in McKeesport, to a point on the opposite side of the river, and that the ferry was so maintained; defendant was then (1890) erecting a bridge across the said river "between the points where the ferry is located and on the exact line of the ferry," obstructing the route of the ferry, and had placed abutments at the ends of the bridge so as to interfere with the business and operation of the ferry; that the bridge was an obstruction, and would, if completed, destroy the ferry's franchise. Plaintiff prayed an injunction and damages. The answer denied the obstruction, etc., also averring laches on plaintiff's part.

The evidence showed that the bridge was built across the route of the ferry, not on it or over it, and the master, S. C. McCandless, Esq., denying the right to an injunction, and to damages for diversion of traffic, limited the question to the damages resulting from the appropriation of the landing and the obstruction of the passage. He finds the following conclusions:

"A careful consideration of all the evidence on this point leads to the conclusion, and I find as a fact, that the ferry-boat landing on the McKeesport side was at or very near the place now occupied by the up river edge of pier No. 1.

"Having found as above, would it be possible to operate this ferry successfully on its original line?

"With reference to this question, the same diversity in the testimony, from observation and opinion, exists, as in the testimony with regard to the location of the landings, and this may likewise be accounted for by the change made in the moorings of the wire rope and, in addition, by the idea on the part of some of the witnesses that, in crossing the river, there would be no necessary deviation from a straight line.

"If I could adopt this idea, the possibility of a passage above the piers, by the old route, might be entertained.

"But there is evidence in the case to show—that about the latter part of June, 1890, the line was moved up the river 80 feet or more on each side; that the rope was slack enough to sink "right after the end of the boat" and, neces-

sarily so, in order to avoid contact with other craft navigating the river; by expert testimony that ferries of this kind must be operated by means of a slack line; and, as illustrated by Exhibit D, produced in connection with the testimony of the expert witness, the sag of the line caused by the current of the river or the wind, would be sufficient to carry the boat below the position occupied by the river piers, presuming the rope to be fastened at the points indicated by my previous finding in respect to the landings.

"Such being the case, the conclusion follows, that the bridge crosses the line upon which the ferry was operated under its charter and that, in the ordinary navigation of the boat, its passage across the river would be obstructed by, at least, two of the river piers.

"We have here a case of direct interference with a right exercised by a party under a grant from the State, by the holder of a subsequent grant from the same source, without leave of the injured party or even the tender of compensation (Const. Pa., Art. 18.) and I find that the plaintiff is entitled to a decree for the damage sustained thereby.

"Excluding the proof of the earnings of the ferry, as inapplicable thereto, because the loss of the same is rather 'the inevitable result of business competition and improved facilities of travel' than of the direct interference, there is no evidence to show the amount of the damage recoverable in this case.

"Therefore, I find and report that the plaintiff has sustained damage amounting to six and a fourth cents and is entitled to recover the same, with costs, from the defendant, and I recommend that a decree be entered in accordance with this finding."

The Court of Common Pleas confirmed the report and entered a decree for six and one-fourth cents damages and costs. From this plaintiff appealed to the Superior Court which affirmed the lower court's decree, whereupon this appeal was taken.

For plaintiff, *David S. McCann*.

Contra, *James Fitzsimmons*.

Opinion by DEAN, J. Filed January 4, 1897.

The Riverton Ferry Company was organized under charter from the Commonwealth, dated May 23, 1883, to maintain a ferry across the Monongahela River from the foot of Riverton street in McKeesport to a point in Mifflin township on the opposite side of the river. The ferry was established at a considerable expenditure of money, and the company continued to operate it down to 1890, when it was interrupted by the

bridge company, this defendant, which had been chartered in June, 1890, with power to erect and maintain a bridge across the river from the foot of Riverton street to a point on the opposite side of the river. The bridge the master finds was built directly across the line of the ferry. The facts that the landing of the bridge was authorized at foot of Riverton street, the same point which the ferry company had been authorized to appropriate seven years before and that the bridge company was authorized to build across to a point on the opposite side would seem to warrant an implication of authority to the bridge company to appropriate the property of the ferry company. However this may be, the master has found as a fact that the ferry company remained silent for months, until there had been a large expenditure of money by the bridge company, before it moved by proper proceedings to restrain interference with its rights, and therefore by laches lost in equity the right to an injunction restraining the bridge company from completing and operating its structure. Therefore, while he finds the construction of the bridge resulted in an appropriation to some extent of the ferry company's property, and the destruction of its power to operate under its grant, it is at most only entitled to a decree for damages. He then finds that in assessing the damages, any proof of earnings of the ferry company up to the time its operations were stopped by the building of the bridge, is irrelevant, because the stoppage of earnings results from inevitable competition by an improved method of crossing. He therefore assesses against defendant only nominal damages, six and one-fourth cents. The conclusion of the master seems to be based on a remark of Justice MITCHELL's in *Ferry Co. v. Bridge Co.*, 145 Pa. 404. In that case a ferry company was chartered in 1885, and a bridge company in 1888 over Big Beaver Creek in Beaver county. The ferry company sought to restrain the bridge company from adopting a bridge site 500 feet from the ferry on the ground that the legislation then in force prohibited the bridge company from building nearer than 3,000 feet. There was evidence the ferry company's property would become practically valueless if the bridge were constructed only 500 feet from it. But this court decided that the limitation of 3,000 feet had been repealed by subsequent legislation and that even if the revenues of the ferry company were actually transferred to a new and more convenient method of travel, that was no reason for granting an injunction. In the course of the opinion this language is used: "All its rights (the ferry company's) as

the first or prior occupant of its ferry, are preserved to it by the terms of the act, but they do not include any monopoly or exclusive right within 3,000 feet or any other prescribed distance; and the claim thus failing, there is no evidence that any of its rights have been infringed, or the loss which it is likely to suffer is other than the inevitable result of business competition and improved facilities of public travel." These remarks are clearly applicable to the facts of that case; the bridge was 500 feet from the ferry; each could operate its own method of crossing the river without interruption from the other, except that resulting from competition, and for that the law afforded no redress. But, if the bridge company in that case, as here, had appropriated one of the ferry company's landings and built its structure across the line of the ferry an entirely different state of facts would have been presented. The question then would have been, did the physical seizure of part of the ferry company's property, and the physical interruption of its operations destroy its earning power? If so, what was the value of the earning power lost by such appropriation of its property? It may be, and it probably is, correct to say that here, after this bridge was built and open to the public the earning power of the ferry company was practically at an end, but in the interval, between the commencement and completion of the bridge, nearly a year, the evidence showed the ferry had a capacity to earn if it had not been destroyed. It was therefore entitled to a computation of the damages it had sustained to this extent at least; for that loss was not the result of competition, but of taking. Starting with the master, this conclusion runs through all the decrees. The facts are assumed correctly, but their significance is overlooked by a mistake as to what was decided in *Ferry Co. v. Bridge Co.*, *supra*. We have no evidence before us which will enable us to compute the damages; the master rejects the evidence offered to that end, or disregards it, and it seems to have gone no further than the Court of Common Pleas, but the master finds only nominal damages, and states explicitly his reason for not assessing more; the reason is erroneous. While we concur in all his findings and conclusions except this one, as to it, we reverse the decree, thereby sustaining appellant's 5th, 8th, 7th and 8th assignments of error. As to the other assignments they are overruled, and it is directed the case be referred back to the master for assessment of damages other than nominal, on the evidence before him, or after taking such other evidence in this particular as will enable him

to make a satisfactory computation of the damages as indicated in this opinion.

Orphans' Court.

In re Estate of TABITHA A. SILAR, Deceased.

A direction in a will to sell real estate for the purpose of distributing the proceeds to legatees does not continue the lien of the general debts beyond the statutory period; and where the sale is made after its expiration, the general creditors cannot participate in the distribution of the proceeds.

Opinion by OVER, A. J. Filed October 10, 1896.

The decedent was indebted to J. W. Hague in the sum of one hundred dollars, and Eliza French in the sum of fifty dollars, for which claims are presented and established by the evidence.

It is objected to them that they are not liens on the fund which arises from the proceeds of the sale of decedent's real estate made more than two years after her decease. She died testate on the 16th of July, 1893. The act limiting the lien of general debts to two years therefore applies; and as no action was brought, nor statement filed within that period, the objections are well taken; unless the will creates an express active trust of the real estate which subjects it to the claims of creditors beyond the statutory period: *Seitzinger's Estate*, 170 Pa. 532. That it does not seems clear. The clauses bearing on this question are the first, seventh, eighth and ninth. The first contains the needless direction that all just debts shall be paid, and creates no trust. The seventh authorizes the executor to sell the real estate "at private or public sale as may be approved by the court." If the purpose of the conversion was to pay debts, it may be a trust would be created which would preserve their lien. No such purpose, however, is expressed, nor even intimated. But on the contrary, as the eighth clause directs that "out of the money derived from the sale," the executor shall pay the testatrix's daughter one thousand dollars; and the ninth gives "all the rest, residue and remainder" to her son, it is evident that the sale was directed for the purpose only of making distribution of the proceeds to her children. In *Bindley's Appeal*, 69 Pa. 209, it was said that "the leaning of this court through the whole current of the decisions upon the subject has evidently been to favor the heir and to require of the creditor the vigilant prosecution of his claim." The claims objected to are therefore disallowed.

For accountant, *James M. Nevin*.

For creditors, *James Fitzsimmons*.

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Supreme Court, Penn'a.

WHERRY, for use, v. WHERRY, Adm'rx.

One who obtains a judgment against a garnishee, based on the latter's indebtedness to the principal debtor on another judgment, cannot of his own volition, and without attempting to levy execution on the judgment recovered in the garnishment proceedings, substitute himself as use plaintiff in the judgment which his debtor holds against the garnishee, and issue process for its revival and collection.

Appeal of Ida B. Wherry, widow and administratrix of T. T. Wherry, deceased, Maggie E. Wherry and Paul Wherry, minor children of T. T. Wherry, deceased, and his heirs, by J. M. Leech, guardian, defendants, from the judgment of the Court of Common Pleas of Armstrong county, in an action *scire facias* to revive and *quare executionem non*, brought by Ida B. Wherry, for use of D. L. Rosensteel.

D. L. Rosensteel, having obtained judgments against Ida B. Wherry, issued a *scire facias* to revive, etc., upon a judgment, Ida B. Wherry v. T. T. Wherry.

The facts of this case, as they appeared on the trial before RAYBURN, P. J., are fully stated in the opinion of the Supreme Court, *infra*.

The defendant presented, *inter alia*, the following points, both of which were refused:

7. Under all the evidence in this case the verdict must be in favor of the defendants.

8. The judgment of D. L. Rosensteel v. Ida B. Wherry on attachment executions Nos. 16 and 17, September Term, 1890, only allowed the plaintiff to have execution of so much of the debts, dues, moneys, property, etc., belonging to Ida B. Wherry, administratrix of T. T. Wherry, as may satisfy the judgment of the plaintiff, and did not give him any specific part of the judgment of Ida B. Wherry v. T. T. Wherry, No. 122, September Term, 1883, and said attachment did not authorize Rosensteel to make himself the equitable plaintiff with power to revive said judgment.

The court charged the jury to find for the plaintiff. Verdict and judgment accordingly.

This appeal was taken and the refusal of the

above points and the instructions to find for plaintiff were, *inter alia*, assigned as error.

For appellant, W. D. Patton.

Contra, M. F. Leason and J. W. King.

Opinion by MCCOLLUM, J. Filed January 4, 1897.

Ida B. Wherry on the 10th day of July, 1883, obtained a judgment against T. T. Wherry, her husband, who died on the 26th of April, 1884, without having paid the judgment or any part of it. Letters of administration upon his estate were issued to her, and J. M. Leech was appointed guardian of his minor children. On the 5th of January, 1889, Ida B. Wherry gave her note to D. L. Rosensteel for \$318 on which he entered a judgment against her. On the 4th of June, 1890, he obtained another judgment against her for \$323.58, and on the same day he issued an attachment execution upon each judgment, and summoned Ida B. Wherry, administratrix of T. T. Wherry, deceased, as garnishee.

In each attachment proceeding there was a verdict and judgment against the garnishee for the sum due the plaintiff on his judgment against the defendant, the execution issued thereon to be levied, etc., in accordance with the established procedure in such cases: See *Bonnafon v. Thompson*, 83 Pa. 460, and *Hartley v. White*, 94 Pa. 81. The judgments against the garnishee were based upon the indebtedness of the estate to Ida B. Wherry on her judgment against the decedent. On the 8th of July, 1893, Rosensteel's attorneys filed a *præcipe* for a *sci. fa.* on the last mentioned judgment naming Ida B. Wherry for use of D. L. Rosensteel as plaintiff and the administratrix and minor children of T. T. Wherry, deceased, as defendants. The *sci. fa.* was issued and Ida B. Wherry, administratrix aforesaid, appeared in answer to it and alleged, *inter alia*, that the issuance of it was unwarranted. This presented, we think, the important and controlling question in the case. The court deeming the defense made as insufficient instructed the jury that it was their duty to find for the plaintiff the sum of \$1,908.99. They did as instructed and judgment was entered on the verdict for that amount. Rosensteel was not subrogated to the rights of the plaintiff in the judgment or authorized to issue any process upon it, by any order of court. Unless the attachment proceedings above recited clothed him with authority to substitute himself as use plaintiff in the judgment, and to enter and prosecute a suit for the revival and collection of it the judgment appealed from should be reversed, and the proceedings which resulted in it should be set aside.

It is claimed by his counsel that his judgments against the garnishee furnished a sufficient warrant for the institution of the suit, and naming him as use plaintiff in it. *In re Fitzsimmons' Appeal*, 4 Pa. 248, and *Reed v. Penrose's Executrix*, 36 *Id.* 214, are cited as authority for this claim. Neither of them, however, decides the question before us. In the former case the question arose on the distribution of the proceeds of a sheriff's sale of the property of Baldwin, who was Fitzsimmons' debtor. The contest was between Fitzsimmons and his creditor who had obtained a judgment against him and issued an attachment execution thereon in which he recovered judgment against Baldwin as garnishee. It did not involve the control of Fitzsimmons' judgment against Baldwin nor the right of the attaching creditor to substitute himself as plaintiff in it and issue process upon it. There is nothing in *Reed v. Penrose's Executrix*, *supra*, which supports the appellee's contention or affects the question presented by this appeal. In *Corson v. McAfee*, 44 Pa. 288, LOWRIE, C. J., referring to the rights of the attaching creditor, said: "His attachment is his suit to reach the debt alleged to be due to his debtor and that is the only remedy to which the law entitles him. By that he gets a judgment against his debtor's debtor and an execution according to his judgment, and it is only in equity that he can claim subrogation to any of the collateral means held by his debtor for securing the debt attached." This appears to us as a true and correct statement of the position and rights of the attaching creditor. The statute which gives him the attachment gives him in express terms process for the enforcement of the judgment he obtained in it. It contemplates the employment of this process before resorting to a suit upon the book account, note or judgment which his debtor has against the garnishee. Ordinarily the execution process given by it is adequate for the accomplishment of his purpose in issuing the attachment. If subrogation to the rights of his debtor in the judgment which the latter holds against the garnishee is necessary for his protection, he should apply to the court for it, and notify the plaintiff of the application. He cannot, of his own volition mark the judgment for his use and issue process upon it. There is nothing in the record before us which shows that an execution was issued on the judgment obtained against the garnishee in the attachment proceedings, or that the judgment could not have been collected by it.

The judgment is reversed and the præcipe and all proceedings thereunder are set aside.

REAGLE et al. v. REAGLE.

A deed direct from husband to wife is valid. While a husband and wife are living upon land held in the wife's name, and the husband pays the taxes, he cannot claim the land under adverse possession. A deed from wife to husband, the latter not joining, is void.

Appeal of Henry Reagle, defendant, from the judgment of the Court of Common Pleas of Mercer county, in an action of ejectment by Miles Reagle, Newton Reagle, James Reagle, John Reagle, J. W. Bates and Maria Bates, his wife, in right of said wife, Lynus Harnett and Racheal Harnett, his wife, in right of said wife, Solomon Faust and Barbea, his wife, in right of said wife, claiming seven-eighths of a tract of land in West Salem township, Mercer county.

The facts, as they appeared on the trial before MILLER, P. J., are set forth in the opinion of the Supreme Court, *infra*.

Verdict and judgment for plaintiffs. The defendant took this appeal.

For appellant, *L. Kuder, E. P. Gillespie and W. C. Pettit*.

Contra, W. W. Moore and J. M. Campbell.

Opinion by MCCOLLUM, J. Filed January 4, 1897.

The parties to this suit are the children of John and Catharine Reagle, deceased. The dispute between them relates to the title of the land described in the summons. The plaintiffs claim to have title to an undivided seven-eighths of the land and defendant claims to have title to the whole of it. In 1843, Thomas Campbell conveyed this land to John Reagle, who went into possession of it the following spring and subsequently by deed dated May 14, 1858, and recorded on the 24th of December of that year, conveyed it to Catharine Reagle, his wife. He and his wife lived upon this land from the time he went into possession of it, as above stated, until her death in September, 1889. That John Reagle had a valid title to the land when he made the deed to his wife is undisputed. That deed, if valid, passed his title to her. The deed recited a consideration of three hundred dollars and contained an acknowledgment of it. It was not fraudulent as to creditors because the grantor had none. "A husband may not only convey directly to his wife for a valuable consideration, but he may also convey to her as a gift when not prejudicial to his creditors." *Thompson v. Allen*, 103 Pa. 48. There can be no doubt that, under the decision of this court applicable to the undisputed facts, the title of John Reagle passed by his deed of May 14, 1858, to his wife.

The deed when recorded was notice of her title and thenceforth the possession of the land was as effectually hers as if she had owned it when they entered and made their home upon it. The husband having invested his wife with title to the land, could not, while they were living upon it, have a possession adverse to hers or by the payment of taxes upon it, impair her title to it. "As the possession of the husband and wife is at best equivocal, neither can rely upon the possession to prove acquisition of title from the other and a wife can assert her title even to property which she has allowed her husband to have taxed in his own name; and this is because it is the policy of the law to encourage the trust and intimacy of the marriage relation. And there is no such thing as adverse possession as between husband and wife as long as they cohabit." 9 Am. & Eng. Ency. of Law, 803.

The plaintiffs claim the land as heirs of Catharine Reagle and the defendant claims it as grantee of John Reagle. But the deed on which the defendant relied was made twenty-four years after John had conveyed the land to Catharine and when his only interest in it was as tenant by the curtesy. It was a life interest which expired on his death in November, 1894. The defendant offered what purported to be a deed from Catharine Reagle to John Reagle, but as it was, under the well settled law of this State absolutely void and without effect upon her title, it was properly rejected. He also offered a deed from John and Catharine Reagle to Rachel Reagle which was rejected because it did not include the land in suit.

We agree with the learned court below that the Act of April 22, 1856, is not applicable to the facts of this case. We discover no error in the rulings complained of and we therefore overrule all the specifications.

Judgment affirmed.

WALLACE v. JAMESON et al.

Plaintiff brought an action of libel against the defendants as owners of a newspaper. Subsequently to the bringing of this action, and before the time of trial, plaintiff was elected judge of the county in which the action was to be tried. When the case was put on the trial list the presiding judge, who was the plaintiff, certified his disability and ordered the case to be heard by the "president judge residing nearest the place of such trial, who shall be disinterested," as provided by the Act of March 22, 1856. On the day set for trial defendants petitioned plaintiffs for a change of venue under the Act of March 30, 1875, who directed it to be presented to the judge to whom the case had been certified for trial, who refused it. *Held*, that these two acts are not repugnant, and that the Act of 1856 having been first applied was necessarily exclusive

of the other, and the petition for a change of venue was properly refused.

At the time of trial objection was made to the trial judge on the ground of personal opinion toward the defendants' newspaper, but which did not relate, however, to any expression of opinion regarding the case to be tried. *Held* not sufficient to sustain a special plea to the jurisdiction of the court.

In such a case a challenge to the array of jurors by the defendant, on the ground that the president judge, the plaintiff, aided the county commissioners in selecting names of jurors for the jury wheel when the challenge is made at the time of the trial and the case had been at issue for a year before the jurors were selected should be quashed.

In an action for libel, where the meaning ascribed to the publication by the plaintiff (an attorney at law) was that he had been a party to the unlawful settling of a criminal prosecution by the bribery of the mayor, it is not error for the trial judge to refuse the defendant a request for change to the effect that the publication was not libelous *per se*, and as there was no allegation of special damage the verdict must be for the defendant.

The plaintiff being a candidate for public office at the time the libel complained of was published, the question whether it was privileged would depend on whether, by the manner and style of the account and the comments thereon, the defendants had exceeded their privilege, which questions were for the jury.

Appeal of David Jameson and Sarah G. Treadwell, from the judgment of the Court of Common Pleas of Lawrence county, in an action for libel brought by W. D. Wallace.

The defendants in this case caused to be published and circulated in their paper the following article:

"Who got the fifty dollars? Sensational evidence admitted in the famous suit against the mayor. W. D. Wallace's office. District Attorney Emery and Detective Marshall say they were approached with offers to divide the \$150. The Italian spoliation.

"No more sensational case has ever been tried in New Castle than that heard to-day before Alderman Bowman in the suit of Louis Tardelli against Mayor Alexander Richardson, to recover \$150 alleged to be amount paid Richardson for the settlement of a criminal proceeding against Antonio Valencia. The most astonishing part of the evidence admitted was brought out in Tardelli's statement that he had negotiated this alleged settlement in the office of W. D. Wallace, the regular Republican candidate for president judge of Lawrence county, and that his receipt from F. L. Genkinger, the alleged go-between, was written in the back room of this attorney's office, on letter paper belonging to Mr. Wallace, and that there were men in that back room whose identity was carefully concealed from him.

"Still more remarkable is the statement made by Antonio Valencia that there were only \$100 brought to Youngstown by Genkinger. Nothing has been brought out to show where went the \$50, the difference between this amount and the amount which Tardelli says he paid Fritz in the office of W. D. Wallace."

On October 25, 1894, the plaintiff entered suit against the managers and publishers of the *New Castle News* for libel. On December 5, 1894, the defendants appeared by counsel, and entered a plea of "not guilty." The case was

placed on the trial list for trial at a Court of Common Pleas of Lawrence county, beginning Monday, May 25, 1896, and on May 1, 1896, W. D. WALLACE, the plaintiff in the suit, being president judge of the district, certified to his disqualification, and directed that the Honorable S. H. MILLER, the President Judge of the 35th District, should hear the case in accordance with the mandate of the law.

On May 25, 1896, the court being in session for the trial of other causes, with Hon. W. D. WALLACE on the bench, the defendants presented a petition to him for a change of venue, which petition he directed should be presented to the Hon. S. H. MILLER, whose duty it was to try and hear the case.

On the same day, at 4:30 P. M., Hon. S. H. MILLER being upon the bench, and the cause being called for trial, the defendants again presented their application for a change of venue, for the reason that W. D. Wallace was disqualified for trying the case, which was refused.

On the disposition of this, a second motion was made to the court, which was a plea to the jurisdiction, which was overruled.

On May 29th a verdict was rendered for the plaintiff for the sum of \$2,500, and judgment entered upon the verdict; whereupon defendants appealed.

For appellants, *D. B. & L. T. Kurtz and J. Norman Martin.*

Contra, B. A. Winternitz, John G. McConahy, W. H. Falls and E. M. Underwood.

Opinion by MITCHELL, J. Filed January 4, 1897.

The first three assignments of error relate to the application for change of venue. At the time this suit was brought the Hon. A. L. HAZEN was president judge of the district and there was nothing peculiar in the case in respect to the time or place of trial, or the judge to try it. But after suit brought the plaintiff was elected president judge, and, of course, was ineligible to try the case. In such a situation the statutes point out two remedies. Under the Act of March 22, 1856, P. L. 500, the president judge may certify his disability and then must order the case to be heard before "the president judge residing nearest the place of such trial, who shall be disinterested." Or by the Act of March 30, 1875, P. L. 35, either party may by petition apply for a change of venue. Each of these acts is effective for the purpose of securing an impartial trial. The intent is the same in both, and there is no repugnancy in the two remedies, to prevent their concurrent existence. But the one which is first applied must there-

after necessarily be exclusive in the particular case. The Act of 1875 is cumulative, and was not intended to repeal or supersede the Act of 1856. When, therefore, the present case was properly certified to the nearest judge, under the Act of 1856, there was no longer any room for the intervention of the Act of 1875, as the common intent of both acts had been secured.

The application for change of venue was tardily made on the day set for trial. The Act of 1875 does not fix any time for filing the petition, but directs that it may be presented "to the court in term time, or to any law judge thereof in vacation," and must be accompanied with an affidavit that it is not intended for delay, thus manifestly indicating that it should be promptly done, and not deferred till the trial is actually called with a jury at hand. In the present case the motion was first made before Judge WALLACE, who properly referred it to the judge to whom the case had been already certified, and the latter refused it on the ground that it was already before a judge appointed by law, under the Act of 1856, to try it, and who was disinterested. In this there was no error.

Before the jury was sworn the defendants filed a special plea to the jurisdiction of the court as constituted. Part of the grounds, relating to the change of venue, have been already disposed of, but the plea asserted the disqualification of Hon. S. H. MILLER to try the case, as he was "not an impartial, unprejudiced and indifferent judge with respect to the matters in issue." The only evidence produced in support of the plea was a letter from Judge MILLER to one of the defendants calling his attention to some articles in the newspaper, and expressing the opinion that he could and did sometimes control the columns of the *News*, and "could put a stop to this if you (he) wished to." Neither the letter nor the matters referred to in it had any connection with the present suit, nor did they in any way show any interest which disqualified the judge.

Objections which merely relate to the judge's personal opinions or feelings and not to his legal interest in the case or the question, are not within the statute, and must be addressed to his discretion: *Ellmaker v. Buckley*, 16 S. & R. 72; *Library Co. v. Ingham*, 1 Whart. 72; *Phila. v. Fox*, 64 Pa. 169, 185.

The fourth assignment is to overruling the challenge to the array of jurors, because the plaintiff in the suit, Judge WALLACE, had participated in the selection of the names and putting them in the wheel from which juries were to be drawn during the year. This objection was made too late. The names were selected

and put in the wheel for the year 1896, on January 6, in pursuance of an order made in the previous month. The case had then been at issue for more than a year (plea filed in December, 1894), and defendants must have known that it was likely to be upon the trial list at any session of the court in 1896, yet they did not make this motion until May 26, after the overruling of the motion to change the venue and the plea to the jurisdiction, and when the jury was about to be called for the trial. It was too plainly meant for delay to be treated with favor. As said by our Brother DEAN in *Klemmer v. Railroad Co.*, 163 Pa. 521, 533, "All text writers on practice say that a motion to quash the array should be made as soon as the facts which warrant it are known."

But if even made promptly and overruled the objection would not warrant a reversal of the judgment. Five hundred names were put in the wheel, and the selection of them was the work of the president judge and the commissioners jointly, the main burden being borne by the commissioners as is evident from their certificate that the judge was present only a portion of the time. With the drawing from this five hundred of the particular panel for the May session of the court, the judge had nothing to do. In *Munshower v. Patton*, 10 S. & R. 334, it was held that the sheriff who returned the jury being a brother of a party, was a good cause of challenge to the array, but it was also said that "it would be no cause of challenge that the sheriff was related to one of the parties, so far as respected his uniting with the commissioners in making out the list, and the other measures preparatory to their summons." The mere co-operation of the interested office in the selection of names to be put in the wheel for the entire year was held too remote to sustain a challenge. The same reason applies with even greater force to the present case. The cause was at issue before the jurors were named for 1895. Was the judge to refrain from the performance of part of his official duty merely upon the chance that his own case might come up for trial during that year? If it did not come up, was he then to refrain for another year? Such a construction would be unreasonable. If the defendants thought themselves in any danger from a jury of the county drawn out of the five hundred so selected, there was ample remedy in a timely application for a change of venue, to an indifferent county.

The sixth assignment is to the admission of a question put to Jameson, one of the defendants, whether he wrote or caused the publication of an editorial in the newspaper subsequent to

the alleged libel. He answered that he had not, and the article was not offered in evidence. Whether this editorial was competent evidence or not depends on matters which do not appear, and nothing is shown in the exception by which appellants could have been injured.

The next two assignments are to the refusal of a nonsuit, which is not the subject of review.

The defendants presented requests for charge that the publication complained of was not libelous *per se*; that there being no allegation, and no proof of special damage, the verdict must be for defendants, and that the publication was not capable of the meaning ascribed to it by the plaintiff, that he had been party to the unlawful settling of a criminal prosecution by the bribery of the mayor. All these requests were properly refused. The judge instructed the jury that the publication was not libelous *per se* unless it charged bribery, which was much more favorable to defendants than they were entitled to, since to impute corrupt or dishonorable action to an attorney in his professional conduct is actionable *per se*, though it fall short of bribery: *Barr v. Moore*, 87 Pa. 385; *Townshend on Slander and Libel*, ed. 1890, pp. 248, 357; *Newell on Libel*, etc., ed. 1890, p. 184, and cases cited. Whether the publication conveyed the meaning charged was for the jury. It was clearly susceptible of it without innuendo or colloquium, if, indeed, it really admitted of any other.

Appellants further claimed that the publication was privileged, and that there was probable cause to believe the statements true. Even if this were fully conceded it would not help the appellants' case. As plaintiff was a candidate for public office, his character and conduct were proper subjects of public discussion, and the publication of any facts throwing light on his qualifications or disqualifications would be privileged. But the publication complained of was more than a narration of even alleged facts. It was a highly sensational and damaging account of an alleged illegal transaction, with mention and reference to the plaintiff as being connected with and party thereto. It brought the case directly within the rulings in regard to the style of the publication. Thus, in *Pitlock v. O'Neil*, 68 Pa. 253, it was said: "Had the publication been confined to the petition filed in the Court of Common Pleas, it might have been considered as privileged, and the plaintiff held bound to prove express malice. But the comments which accompanied it deprived it of its privilege. It has been held to be libelous to publish a highly colored account of judicial proceedings mixed with the party's own observations and conclusions." In *Neeb v. Hope*, 111

Pa. 145, it was said: "The defendants contend that if the publication was made in good faith and without malice they are not liable. This would be so had the article kept within proper limits." And in *Conroy v. Pittsburgh Times*, 139 Pa. 334, it was held that a privileged communication is one made upon a proper occasion, from a proper motive, based upon reasonable or probable cause, and in a proper manner. "If the manner be improper the privilege is lost." While a fair account of the transaction which was the basis of the publication would have been privileged, the manner and style of this account and comment were for the consideration of the jury to determine if the privilege had been exceeded, and were properly submitted to them for that purpose.

The remaining assignments are to the submission of the case to the jury without sufficient evidence, especially against the defendant Jameson. It is enough to say that there was evidence that there was an agreement between the manager of the newspaper and Jameson, who was one of the executors of the former owner, that Jameson was to have control of the political column of the *News* in that campaign, so far at least as related to the candidacy of the plaintiff for the judgeship. Whether he exercised this control in such manner as to make him jointly liable for the publication here complained of was a fact in the case which was fairly submitted to the jury.

In regard to the evidence of express malice, as bearing on the question of damages, it was entirely competent for plaintiff to show that the newspaper had challenged him to explain his connection with the alleged bribery, and when he offered the explanation fortified by affidavits, the paper refused to publish it, even as a paid advertisement. Jameson's liability in this as in other respects was, as already said, a matter for the jury.

Judgment affirmed.

[See next case.]

WALLACE v. JAMESON et al.

A writ of *certiorari* to the Court of Common Pleas, issued without allowance before trial upon the refusal of the trial judge to grant a change of venue and quash the array of jurors, is not a supersedeas and should be quashed.

Certiorari of David Jameson et al. to review an order of the Court of Common Pleas of Lawrence county, refusing to grant a change of venue.

The facts of this case are fully set out in the report of the preceding case, which was argued with this case.

For appellants, D. B. & L. T. Kurtz and J. Norman Martin.

Contra, B. A. Winternitz John G. McConahy, W. H. Falls and E. M. Underwood.

Opinion by MITCHELL, J. Filed January 4, 1897.

It would be sufficient to dismiss this writ for the reason given by the learned judge below in refusing to regard it as a supersedeas, that the appellants had taken it out and had it in their hands when they moved the court below to quash the array of jurors, and having thus submitted their case to the jurisdiction of the court after the issue of this writ, they are in no position to say now that the record had been removed and the court was without authority to proceed. The decisions which hold that the record is to be treated as removed only from the time of actual filing of the writ in the court below and not from the time of issue out of the office of this court, were intended to save the action of the court in the cause while the record is still actually there, and the court has no official knowledge of the order for its removal. They had no application to such a case as this.

But the writ must be quashed on broader grounds. It is not the appropriate remedy, and it was issued prematurely without allowance. The suit was a common law action for libel. During its progress, before its actual call for trial by the jury, various dilatory motions were made,—for change of venue, to quash the array of jurors, a plea in abatement to the jurisdiction of the court as then constituted, etc. These matters are not ordinarily subjects of *certiorari*. It is true they are regulated by statute, and that *certiorari* is the proper writ to review proceedings out of the course of the common law, but these matters were not statutory proceedings in that sense, but mere interlocutory steps in the course of a common law action. It has never been held that a party can bring his case to this court piecemeal in this way merely because some of the preliminaries to the trial have been regulated by statute somewhat at variance with ancient common law forms. If a defendant could have the case reviewed in this way at every step, he could delay the plaintiff indefinitely, and load this court with matters that belong to the tribunals of first instance. He must wait until he is aggrieved by a final judgment and bring the whole case here at the same time.

The *certiorari* moreover was issued without an *allocatur*. It is not a writ of right unless made so by statute: Am. and Eng. Ency. of Law, tit. *Certiorari*, sec. 5, and in theory

at least must always be allowed specially. While this requirement is commonly regarded as merely formal, yet that practice is limited to writs for purposes of review only, after judgment: *Com'th v. Nathans*, 5 Pa. 124. In *Re Road in Selin's Grove*, 2 S. & R. 419, the *certiorari* was quashed because it appeared that the Quarter Sessions had made no final order.

Certiorari quashed.

[See preceding case.]

PITTSBURGH v. CHILDS et al.

The municipal authorities are sole judges of the kind of pavement best adapted to needs of the street where it is laid, and testimony as to what the proper cost should be must be confined to what that cost would justly have been at the time the pavement was laid.

The finding of viewers on questions of fact approved by the court should not be disturbed except for clear error.

Where a regrading of a street is necessary to receive a pavement adopted by the proper municipal authorities and no part of the cost is included in the calculation of benefits assessed against property affected, the property owner has no standing to object to the regrading.

Under the Act of May 16, 1891, P. L. 80, where a contract for paving may be subject to an objection as to irregularity if the contract be one the city could have authorized, it may waive such irregularity, and the acceptance of the work is such waiver and a ratification of the unauthorized work.

City v. McCormick, 165 Pa. 386, followed.

Appeal of A. H. Childs, Clara C. McCormick and James McKay from the decree of the Court of Common Pleas No. 3, of Allegheny county, dismissing appellants' exception to the report of the board of viewers for the paving and curbing of Amberson avenue in Pittsburgh.

The facts of the case, appearing from the record, were that in September, 1889, some of the residents of the frontage on Amberson avenue applied to councils for the paving and curbing of Amberson avenue, acting under the Act of May 16, 1889, P. L. 228, (declared unconstitutional in *Pittsburgh's Appeal*, 138 Pa. 401), and councils passed an ordinance authorizing the improvement.

On June 17, 1891, the city of Pittsburgh petitioned for the appointment of viewers to ascertain and determine the costs, damages and expenses of the paving and curbing.

Exceptions were filed to the finding of the viewers and upon argument the exceptions were dismissed and the report was confirmed. An appeal was taken to the Supreme Court (*Omega Street, Traver's Appeal*, 152 Pa. 134).

On February 18, 1893, the report of the viewers was recommitted to them, and having made the reassessment in accordance with the order of court, exceptions were filed by A. H. Childs,

Clara C. McCormick and James McKay to the report, which were dismissed, and the report confirmed. The exceptants appealed, assigning as error the dismissal of the exceptions, which related to the assessment of benefits against the property owners of the cost of paving the footways and of grading, and those which raised the question as to the manner of doing the work, and the quality of the material used.

For appellant, *M. A. Woodward*.

Contra, *T. D. Carnahan* and *Clarence Burleigh*.

Opinion by FELL, J. Filed January 4, 1897.

The assignments of error may be considered under three heads—those which relate to the allowance against the property owners of the cost of paving the sidewalks, those which relate to the recovery from the city of the cost of grading, and those which raise questions of fact only as to the manner in which the work was done, the fair value thereof, and the equitable apportionment of the cost of improvement among the properties benefited.

The improvement of Amberson avenue was made under the Act of May 16, 1889, which was decided in *Pittsburgh's Appeal*, 138 Pa. 401, to be unconstitutional. The assessments were made under the remedial Act of May 16, 1891. The precise question here raised as to the right of the city to recover for paving sidewalks, no notice having been given to the owner to pave, was considered in *Bingaman v. Pittsburgh*, 147 Pa. 353, and decided adversely to the appellants' contention. In that case a bill had been filed to restrain the city from proceeding to assess benefits for street improvements which included the paving of sidewalks. The right to include the sidewalks in the contract for curbing and paving was denied because under the Acts of April 18, 1857, and April 1, 1868, the owners of abutting properties were entitled to notice before the letting of contracts. It was held that as the property owners had enjoyed the benefit of improvements under a void act, the Legislature had the right to legalize what it might have previously ordered, and that the city could recover the cost of paving the sidewalks. In this case the laying of the sidewalks was directed by the ordinance, and it was included in the proposal and the contract. The objection to the claim was one which the Act of 1891 was intended to remove, and which this court decided was removed, and the question must be considered as definitely settled.

Amberson avenue had been graded some years before the improvement in question was made. Some additional grading was required

to prepare the surface of the street for the pavement, and some was directed to be done by the city's engineer in order to conform the grade of Amberson avenue to the grade of intersecting avenues which had already been paved. It was the duty of the contractors to do all grading required in the preparation of the surface, and it was written in the proposal "the price per square yard for paving includes 6304 cubic yards of excavation necessary to bring the avenue to proper subgrade." When at the hearing before the viewers it appeared that the avenue had been graded and that this was a regrading not chargeable to the property owners, counsel for the city withdrew all claims for grading and excavation, and the viewers deducted from the price charged the estimated cost of grading, reducing the price of the pavement from \$3.85 to \$3.35 per square yard. No part of this cost was included in the assessment of benefits, and the property owners were assessed only for the cost of placing a pavement on a street already prepared for it. The city went to the extreme limit of fairness and liberality. The plaintiff being relieved of the charge has no standing in this proceeding to object that it was assumed by the city. Nor is the authority of the city to assume the debt the subject of doubt. In *McCormick's Appeal*, 165 Pa. 386, which arose from a proceeding to assess benefit under the Act of 1891, the city engineer without authority of councils had made a change of grade during the progress of the work, which increased the cost thereof. It was held, following *McKnight v. City*, 91 Pa. 273; *City v. Hays*, 93 Id. 72, and *Manufacturing Co. v. Allentown*, 153 Pa. 319, that as the contract was one which the city could have authorized, it could waive the irregularity, and that the acceptance of the work, the assertion of a claim founded upon it, and the confirmation of the report of viewers at the instance of the city, were a ratification of the unauthorized act.

The remaining assignments relate to the character and price of the work and the apportionment of the benefits. They present questions of fact which have received the careful attention of the viewers and of the court. Much of the testimony was directed to show that the pavement was not of the best and most durable quality. In making the improvement it was the public need that was to be served, and the judgment of the property owners as to the kind of pavement they should have was subordinate to that of the city authorities, who were the sole judges as to the kind of pavement best adapted to the avenue which the city could afford to put down. The property owners got a substantial pavement, if not one made in the best manner

and of the most expensive materials. It was put down in 1889, and in 1893 the viewers reported that although the pavement had been subjected to exceedingly heavy and continuous travel, the surface was then smooth, solid, regular and durable, and that there were then no indications of weakness, insecurity or defective workmanship or material in the foundation. This report as to the actual condition of the street seems to be fully warranted, and we find nothing in the testimony which impeaches it. Two of the exceptants testified before the jury that the pavement was a good one of the kind, and had resisted an unusual amount of heavy hauling without showing any signs of weakness on the surface or in the foundation.

The testimony as to the value of the work was not directed to show the price at which it could have been done at the time the pavement was laid, but was expert testimony as to the price charged at different times in other cities. We find no testimony that the pavement could have been laid in Pittsburgh in 1889, when the contract was made, at a less cost than that which the city paid. At the time the contract was made the city did not pay promptly for work done, or allow interest on deferred payments, and it appeared from the testimony that the contractors, because of the expected delay in payment, had charged forty-five cents more per square yard. This excess of charge was deducted by the court at the hearing of the exceptions, and the cost to the city of \$3.85, which had been reduced by the viewers because of the charge for grading to \$3.35, was further reduced by the court to \$2.90 per square yard.

The finding of the viewers on questions of fact, approved by the court after a thorough examination, should not be disturbed except for clear error. We find nothing in the record of the case which would justify us in sustaining any of the assignments, and they are all dismissed, and the decree is affirmed at the cost of the appellant.

—A statute prohibiting any other business except the sale of cigars and tobacco to be carried on in a room in which intoxicating liquors are sold under a license and prohibiting any device for amusement or music therein and also requiring such rooms to be closed and locked during prohibited hours and days, is sustained in *State v. Gerhardt* (Ind.) 33 L. R. A. 313, on the ground that such provisions and all similar conditions imposed by the Legislature in the exercise of its police power must be deemed to be consented to by a person who accepts a license.

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In Memoriam.

A Tribute of the Bar of Allegheny County on the Death of Seward W. Haymaker, Esq.

At a meeting of the Allegheny County Bar Association, held January 28, 1897, to take action on the death of SEWARD W. HAYMAKER, Esq., the meeting was called to order by William A. Blakeley, Esq., and on motion of R. M. Ewing, Esq., Judge Porter was called to the chair, and in a most fitting manner eulogized the deceased.

On motion the following were named vice-presidents: Hon. J. W. Over, Hon. Robert S. Frazer, Hon. F. H. Collier and Hon. S. A. McClung. Secretaries—Blaine Ewing, S. L. Dille and Thomas E. Finley. Committee on Resolutions—John D. Shafer, H. L. Castle, H. R. Ewing, Geo. P. Murray and Alex. Gilfillan.

Mr. Shafer, on behalf of the committee, read the following memorial, which was adopted:

We are met again to pay our last tribute of respect and affection to the memory of a brother of our profession, and to testify our regard for him and our deep sense of his loss.

SEWARD W. HAYMAKER died January 22, 1897. He was born near Monroeville, Patton township, Allegheny county, Pa., on May 5, 1865. His parents, William N. and Mary Haymaker, both survive him, having given three sons to our profession. He received his early education in the public school and at the Academy at Murfreesville. He entered the Freshman Class at Washington and Jefferson College in 1885, and was graduated in 1889 with distinction. He studied law in the office of his brother, John C. Haymaker, and was admitted to the bar in March, 1893. In December, 1894, he married Miss Margaret Jobe, who, with their little son, survive to mourn him. From the time of his admission to the bar he was engaged actively and successfully in the practice of his profession until August, 1896, when he was stricken by the disease which ended his life.

SEWARD W. HAYMAKER was a man of marked individuality. In all the relations of life he bore himself with unswerving rectitude and with genial kindness. He was faithful to every trust. His spirit was kind and his heart true. His genial humor shed a mellow and pleasing light upon his intercourse with friends and companions, but the flashes of his wit left no trace of bitterness behind.

He pursued the practice of his profession like a wise man, with diligence and care but not with an exclusive and feverish anxiety.

He faithfully promoted the interests of his clients, but with an honorable regard for the rights of others, unbounded fidelity to the court and unfailing courtesy to all. His all too short career at the bar was not of such continuance as to be much more than a prophecy of what he might have attained, but the promise was bright and the partial fulfillment unsullied.

Devoted as he was to his profession, he did not neglect the duties and pleasures of social and domestic life, but gave to each its due season. The memory of his happy moods and sayings will long live with his companions, and his affectionate tenderness in a more intimate circle is for his dear ones an eternal possession.

It is not necessary nor fitting that we should enter here into a history of his life or an analysis of his character. These broad outlines are enough for those who did not know him, and his friends can fill them up each from the treasures of his memory better than we.

We feel that we and our profession have sustained in his death a material loss. When one who has wrought his allotted time among us and arrived at the threshold of old age, ceases from his labors and is gathered to his fathers, we lay him in the grave with sorrow indeed, but sorrow rather for the fate of humanity than for him. But when one such as he whom we now mourn, just entering upon his life work, whose years of preparation are just beginning to bring forth their fruit, is stricken down by our sides, our grief takes another tinge. When we see such borne away by a wasting disease, not suddenly, but in the face of scientific skill and loving care and loved ones' prayers, our hearts are plunged in an infinite sorrow, and we are tempted to gird at the poor skill of human science, and almost to accuse the ways of Providence. The problem is world old. Each one must solve it as he may.

But whatever be our attitude in presence of these mysteries, we shall at least make our lives better if we allow our departed brother's untimely death to bring into our minds the reflections which only such an event can bring vividly before us.

To the bereaved parents and brethren and the sorrowing wife we offer our heartfelt sympathy, to the infant son, our fondest hopes, and to the memory of our departed brother the tribute of our esteem and the united voice of our sorrow.

It was ordered that a copy of the minute be sent to the family of the deceased, and the proceedings be spread upon the minutes of the courts of the county. After remarks by R. M. Ewing, H. L. Castle, S. L. Dille, Thomas E. Finley, Thomas Ewing, Jr., and Geo. P. Murray, the meeting adjourned.

Supreme Court, Penn'a.

FRIEND v. OIL WELL SUPPLY CO.

Defendant leased from plaintiff a tract of ground over part of which a railroad company had a bridge. During defendant's tenancy the railroad repaired its bridge, using part of the ground leased, and thereby depriving defendant of its beneficial use for a time. Held, that this was no defense to the action for the rent. Defendant leased the property when it was notoriously subject to the easement, and it cannot complain that the railroad company saw fit to use its rights in repairing the bridge.

Appeal of the Oil Well Supply Company, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of *assumpsit* brought by James W. Friend to recover a balance of rent unpaid.

On March 12, 1892, the Oil Well Supply Company, having entered into possession and operations of the Eagle Rolling Mill, as a subtenant of the Oliver Iron & Steel Company, the lessees of J. W. Friend, plaintiff in this suit, obtained a lease of that date from Friend for the said rolling mill, for one year from July 1, 1892, at the rental of \$6,000, payable \$500 monthly; the lease requiring the return of the premises at the end of the term "in good and sufficient repair as when received, reasonable wear and tear and accidents by fire excepted."

At that time the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, as successors of former railroad corporations, maintained over and above the buildings, machinery, etc., of said rolling mill, a railroad bridge or viaduct supported on stone piers and running directly over and above and in the immediate neighborhood of the most important and most necessary parts of said rolling mill.

After the execution of the said lease from Friend to the Oil Well Supply Company on March 12, 1892, and in June of that year, the said railroad company made known to the Oil Well Supply Company its purpose to rebuild its bridge, and of the purpose to use the ground underneath, so far as might be necessary, for the taking down of the old structure and the erection of the new one.

On the first day of July, 1892, the said railroad company entered upon the said rolling mill property and proceeded to replace the old bridge by a new one, and at the same time do the same in such a way as to not interfere with the great traffic of the road at that place, and to do this a large part of the space beneath the bridge and near adjoining the same was filled up with false work, so called, and so much of the rolling mill property, as interfered therewith, was removed, or so obstructed as to render the same of no use.

This bridge passed over or near the water tanks and boilers which supplied the mill with its steam power, and some ten or eleven furnaces; and the ore-crusher, constituting the essential and most important parts of the mill, without which it could not be operated, and the use and operation of all these were prevented by the false work under said bridge and the work of rebuilding of the same, and in addition thereto the roofs of the boiler-house and the ore-crusher or ore-house were removed and some of the boiler pipes cut off and removed, a water

tank spoiled and the main parts of the mill made inaccessible for the operations of the mill.

The court below charged the jury that "under all the evidence in this case the verdict must be for the plaintiff for the full amount of his claim."

Verdict for plaintiff for full amount of his claim, and defendant appeals.

For appellant, *M. A. Woodward.*

Contra, Knox & Reed and Edwin W. Smith.

Opinion by STERRETT, C. J. Filed January 4, 1897.

There is practically no controversy as to any of the material facts in this case. On March 12, 1892, by written agreement, plaintiff leased to defendant company, for one year from July 1, 1892, "all that portion of Eagle Rolling Mill" described therein, for the yearly rent of \$6,000, payable monthly, etc. Prior to the date of said lease, the rolling mill had been occupied by the Oliver Iron & Steel Company under lease from plaintiff which expired on July 1, 1892. By and with the consent of their lessor, that company had sublet part of said property to the defendant company, and it had entered upon the demised premises, and was in possession thereof prior to March 12, 1892, and continued in possession until July 1, 1893, the expiration of the first-mentioned lease. This suit was brought to recover the one year's rent due under that lease. The defense was eviction by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company under paramount title, etc. On the trial, the learned judge refused to charge as requested in defendant's first and second points, viz.: "(1) That, under all the evidence, the jury should find a verdict for the defendant. (2) That the jury should not find against defendant any rent for any term of the lease beyond such time as the defendant had the full, free and uninterrupted enjoyment of the property, as contemplated by the lease when given." On the contrary, he instructed them, as set forth in that part of his charge recited in the first specification of error, viz.: "In view of the fact that the bridge stands there to-day practically in the same condition that it was in 1864, and has so remained clear down to the present time, save that the structure has been removed, one material taking the place of the other, or one piece of iron taking the place of another, the bridge being strengthened; in view of the fact that the defendant was in possession at the time the lease was made, and had operated this mill subject to the easement overhead; in view of the fact that the injunction proceedings had been instituted before the 1st day of

July [1892], and that, notwithstanding all that, the defendant remained in possession by its agents, and exercised the control of the property, and retained possession down until the date of the expiration of the lease,—we are led to affirm the point submitted by the learned counsel representing the plaintiff, "That, under all the evidence in this case, the verdict must be for the plaintiff for the full amount of his claim."

The facts of which this instruction is predicated are not controverted, nor does the record disclose a single disputed fact that was material to the defense and should have been submitted to the jury. The only question is whether the learned trial judge erred in directing a verdict for plaintiff, and in refusing both of the defendant's points above quoted. We are all of opinion that he did not. The railroad bridge or viaduct referred to by the court below was erected prior to 1865, and, having been destroyed by fire, was rebuilt in 1865. From the date of its original construction until the present time it has stood on the same abutments, etc. The right of way, for that part of the railroad, etc., was acquired by condemnation proceedings in the District Court of Allegheny county at No. 115 July Term, 1855, in connection with the release of James Wood, then owner of the Eagle Rolling Mill property, executed December 2, 1864, and duly recorded, etc. For the consideration therein set forth, said Wood, for himself, his heirs, executors, administrators and assigns, granted and released unto the then owners of the railroad, their successors and assigns, forever, the right of way for their railroad tracks, bridges and abutments, as the same are now located through, over and upon a certain tract of ground, and over a certain rolling mill, situate on the south side of the Monongahela River, at or near Saw Mill Run, being all the rights, liberties and privileges secured by the Pittsburgh & Steubenville Railroad Company by virtue of divers proceedings had in the District Court of Allegheny county at No. 115 July Term, 1855, the said record and proceedings being taken and made as part of this release." He also released them "from all claims for damages by reason of the location of the said railroad and bridge of the said companies, through, over or upon the tract aforesaid." The perpetual servitude thus imposed upon a portion of the rolling mill property, with all its incidental rights of maintenance, repair, reconstruction, etc., pertaining thereto, has been continuous, open and manifest to all who had anything to do with the property; and its effect on the servient property must have been contem-

plated by both lessor and lessee when the lease in question was executed. With this bridge or viaduct, constituting a section of the railroad, there upon the ground, the defendant went into possession as the subtenant of the Oliver Iron & Steel Company, and afterwards took the new lease from the plaintiff. It cannot be doubted that the defendant was fully aware of the open and visible servitude to which the demised property then was, and would continue to be, subject, while in its possession as lessee. It is well settled that, where a continuous and apparent easement or servitude is imposed upon land, a purchaser of the servient property, in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude: *Cannon v. Boyd*, 78 Pa. 179; *Geible v. Smith*, 146 Id. 276; *Ormsby v. Pinkerton*, 159 Id. 458. This principle is not restricted to cases between the owner of the servient and the owner of the dominant property: *Eby v. Elder*, 122 Pa. 342. In that case the defense interposed to a purchase-money mortgage was that the land purchased was encumbered by a private right of way, and it was held that "if, when land is conveyed, it is openly and plainly subject to an easement of way, the existence of the easement will be no defense to the payment of the purchase money, as a breach of the covenant against encumbrances implied from the words 'grant, bargain and sell.'" In *Memmert v. McKeen*, 112 Pa. 315, the encumbrance that was claimed to be a breach of the implied covenant, etc., consisted of stone steps, belonging to the adjoining house, but so constructed as to occupy a portion of the sidewalk in front of plaintiff's house. Both houses formerly belonged to the defendant, who, in 1865, sold the one to which the steps were appurtenant, and, in December of the following year, sold the other to the plaintiff. The steps were then in existence, plainly visible to the eye, and a servitude upon the property. After examining the house, plaintiff's husband, as her agent, bought it, and therefore took it with his eyes open to the servitude. It was held, in substance, that the servitude was not an encumbrance, within the meaning of the implied covenant; that, assuming the steps to be an injury to plaintiff's property, the presumption was that such injury was in contemplation of the parties, and that the price was regulated accordingly. In the language of the court, the servitude "was a physical condition of the property, notorious in its character, and affecting its value, and, under all the authorities, we must presume the price to have been fixed with reference to it." Other authorities

to the same effect might be cited, but those above referred to are sufficient.

The soundness of the underlying principle therein recognized cannot be questioned, nor is there any valid reason why the same principle should not be applied in cases between lessor and lessee, where it is clearly shown that the latter was fully aware of the fact that the demised premises, or part thereof, was subject to an open, notorious and permanent servitude or easement, such as the railway viaduct, etc., in this case. In such cases, unless something to the contrary appears, it is fair to assume that the parties contracted with reference to the then existing condition of the premises, and that the lease was made and accepted subject to the railway company's right of way over some of the buildings composing the rolling-mill plant, together with all the incidental rights pertaining to such an easement. It so happened that the railway company found it necessary, during a few months of defendant's term, to exercise some of those incidental rights in repairing and practically reconstructing its viaduct. In consequence of this, the defendant was more or less inconvenienced and deprived of the beneficial enjoyment of a part of the premises during that time; but that result was neither the fault of the plaintiff nor a matter over which he had any control. If an unreasonable time was consumed in the work of reconstruction, or if anything to defendant's injury was done by the railway company, in excess of the authority acquired by the condemnation proceedings and release aforesaid, defendant company's remedy, if any it has, would be against the wrongdoer, and not against the plaintiff.

It is unnecessary to consider the plaintiff's further answer to the defense against the payment of rent, viz., "that there was no eviction in this case." It follows, from what has been said, that there was no error in directing the jury to find for the plaintiff the full amount of his claim. The authorities mainly relied on by the learned counsel for defendant are inapplicable to the undisputed facts of this case.

Judgment affirmed.

MANN et al. v. WAKEFIELD.

A. assigned to B. as trustee for C. certain goods and book accounts in consideration of his indebtedness to C. A. at the time was insolvent and unable to pay his debts. Held, that this assignment came under the voluntary assignment Act of April 17, 1843, and inured to the benefit of all creditors equally.

Appeal of J. A. Wakefield, trustee, defendant, from the decree of the Court of Common Pleas

No. 1, of Allegheny county, in a petition by Mann, Moon & Co. to have said trustee declared an assignee for the benefit of creditors of Trembly & Co.

The assignment referred to in the opinion was as follows:

Know all men by these presents, That we, F. H. Trembly & Co., of the city of Pittsburgh, Allegheny county, Pa., in consideration of our indebtedness due and owing to W. G. Watson & Co. and Pack, Gray & Co., of the amount of \$6,000 (six thousand dollars), have bargained, sold, assigned, transferred and set over unto J. A. Wakefield, trustee for W. G. Watson & Co. and Pack, Gray & Co., of the same place, all the contracts, debts and book accounts, as evidenced by the schedule hereto annexed and made part of this bill of sale, now due and owing to us by the therein mentioned parties, said indebtedness being for goods and merchandise sold and delivered to said parties at their instance and request, together with all our rights, title, interest and claim in, of and to the said contracts, debts, and any and every part thereof, to the only proper use and behoof of the said J. A. Wakefield, trustee, his executors, administrators and assigns; hereby covenanting that the said amounts are justly due and owing without any counterclaim or set-off whatsoever.

For appellant, *R. A. & James Balph.*
Contra, Jennings & Wasson.

Opinion by STERRETT, C. J. Filed January 4, 1897.

This case has all the elements which go to make a voluntary assignment under the Act of 1843. There was a declaration (1) of trust (2) made by debtors (3) on account of present inability to pay their debts, (4) with intent to prefer certain creditors over others. It was immaterial, as was suggested by the court below, that no residuary interest was expressly reserved in favor of the assignors, for that was implied in the character of the transaction. The assignment does not purport to have been made in adjustment and satisfaction of the debt. Directness would have been a badge of good faith, and *prima facie* valid; but the creation of a trust raised a suspicion of collusion which the statute turns to the benefit of all the creditors in proportion to their respective demands, in accordance with the law relative to voluntary assignments. Disposition of the surplus, if any there be, has therefore nothing whatever to do with the application of the statute.

Nor is it material that the assignment involved the completion of certain contracts. That is an obligation which may result from a regular voluntary assignment; and this statute declares that "such assignments" as that under consideration shall be subject, in all respects, to the same laws. The creation of a trust implied the performance of the duties incidental to a lawful purpose. A creditor cannot, by the addition of this or that incident, defeat the benign

purpose of the statute. The sole test of its application is the creation of a trust by an insolvent with intent to prefer. The completion of certain undertakings was not the consideration of the assignment. The assignors were unable to fulfill their obligations "on account" of "needed funds," and therefore forced to assign. The essential characteristics of this assignment necessarily brought it within the mischief which the statute was intended to correct.

The creditors preferred were not *bona fide* purchasers for value. They accepted the assignment with notice of its illegality written in its terms. They parted with no right to pursue any other remedies which they had as against their debtors, and they assumed no obligations save those—if even those—which would have been implied in a voluntary assignment made in the ordinary form. They were emphatically volunteers.

We find nothing in the record that would justify us in sustaining either of the specifications of error.

Decree affirmed and appeal dismissed at appellant's costs.

BARTLEY et al. v. PHILLIPS et al.

Plaintiffs were the lessees of an oil and gas lease, by the terms of which they were to continue operations within thirty days from the execution of the lease and prosecute operations with due diligence to completion or abandonment, and upon failure to comply with these terms the lease was to become null and void. Plaintiffs completed a well within the time limited, but failed to find oil or gas, and then removed from the leased premises. Before the expiration of the lease the owner sold to a third person, who in turn leased the land for oil and gas purposes to the defendants. In an action of ejectment *held*, that the question of whether plaintiffs had terminated their lease by forfeiture or abandonment was a fact *in pais* which could be proved from parol evidence *dehors* the lease.

In such a case, the fact that defendants were aware of the existence of plaintiffs' lease, and that the owner of the property in his deed to the defendants' lessee, refused to assert a forfeiture, put the defendants on inquiry as to whether plaintiffs had forfeited their lease.

It was not error to allow the plaintiffs to deny the abandonment of the leased premises by testifying to their intention of dealing with the property as they did.

Appeal of Thomas W. Phillips and W. V. Hardman, defendants, from the judgment of the Court of Common Pleas of Butler county, in an action of ejectment brought by W. E. Bartley and others, trading as the Farmers' Oil Company, to recover possession of premises leased to plaintiffs by J. A. Hartzell for oil purposes, and afterwards sold and conveyed by Hartzell to defendant Phillips. Defendant Hardman filed a disclaimer.

On the 8th day of September, 1888, James A. Hartzell, the then owner of the premises in dispute in this action of ejectment, made a lease of the same for oil and gas purposes to the Farmers' Oil Company and McCandless & Marks, some of the plaintiffs in this case.

The said lease contained, *inter alia*, the following covenant: "The parties of the second part covenant to commence operations for said mining purposes, within thirty days from the execution of this lease, and when work is commenced to be prosecuted with due diligence to completion or abandonment, and a failure to comply with any of the above conditions renders this lease null and void, and not binding on either party." The plaintiffs associated others with them and began their operations within the time limited, and completed a well in the month of November, 1888, but failed to find either oil or gas. In the January following, being January, 1889, they removed all the property placed on the premises by them. On the 4th day of January, 1890, about one year after the abandonment of said premises by the plaintiff, the said James A. Hartzell sold and conveyed the land, which was included in said lease, to one Samuel A. Zeigler, who on the 14th day of November, 1891, leased the same for oil and gas purposes to Samuel Walker, who sold and assigned said lease on the 17th of November, 1891, to Thomas W. Phillips, the defendant. In the month of March or April, 1892, the defendant Phillips entered on the premises and begun operations for oil and gas, and has ever since been in the actual possession, and operating the premises, and has now several producing wells thereon.

On the 14th day of May, 1892, the plaintiff began this action of ejectment for the premises they had abandoned in January, 1889, more than three years before.

From a judgment in favor of plaintiffs, defendant Phillips appeals.

For appellant, *Clarence Walker and Thompson & Son.*

Contra, Lev. McQuistion, W. A. Forquer and T. C. Campbell.

Opinion by MITCHELL, J. Filed January 4, 1897.

It was decided when this case was here before (165 Pa. 325), that evidence to show the agreement between Hartzell and the plaintiffs as to what should constitute due diligence or abandonment was admissible,—not being an attempt to alter or modify the written agreement, but to define terms used therein. The effect of such an agreement as to parties subsequently

acquiring title from Hartzell without notice was not decided, as the evidence did not then show that any such party was before us. Now, however, the appellant has shown title subsequently acquired from Hartzell; and his main contention is that he was not put on inquiry, or bound by anything not contained in the written lease, and that the admission of evidence of a parol agreement between the parties to the lease would be, as to him, an alteration of the writing without notice. This contention cannot be sustained. Appellant or his agent, it is admitted, had notice, in fact, of the lease. By it he was informed of an outstanding term in plaintiffs for ten years, only three of which had expired. Whether the lease had terminated sooner, by abandonment or forfeiture, was a fact *in pais*, which could not be known from the lease, but only from evidence *dehors*. As to such fact, he was put on inquiry, and the only safe source of information was the lessees. He not only did not inquire of them, but Hartzell's deed gave him notice that the lessor refused to say there was a forfeiture. Under these circumstances, he took the risk whether there had been an abandonment or not, and the jury have found the fact against him. This court has firmly established in a line of decisions from *Wills v. Gas Co.*, 130 Pa. 222, to *Cochran v. Pew*, 159 *Id.* 184, notwithstanding a most determined and persistent struggle of parties for a different rule, that the clause of forfeiture or termination of the estate is for the benefit of the lessor, and that, as against him, no act of the lessee can produce that result without his concurrence. Parties, therefore, who lease or buy with a term apparently outstanding, without inquiry of the lessee, and without the exercise of the lessor's power to forfeit, take the risk of the fact as it may be found by the jury. In this case, as already said, no inquiry was made of the lessees, the lessor in his deed to Ziegler refused to assert a forfeiture, and the jury have found that there was no ground of forfeiture if the lessor had attempted one. The case of *Venture Oil Co. v. Fretts*, 152 Pa. 451, is relied upon by appellant, but there is nothing in it inconsistent with the present view. There the lessor, after an apparent abandonment by the lessee, had made a new lease to other parties, and this court held that to be an exercise of his right to forfeit for abandonment. In the present case, as already said, the lessor made a deed for the fee in the land, but excepted out of the warranty the rights of plaintiffs under the lease.

It is further assigned for error that the court below permitted the plaintiffs to deny the abandonment by testifying to their intentions

in dealing with the property as they did. This question is somewhat novel, having only arisen in its present shape since the recent changes in the common law by which parties are made competent to testify. In *Association v. Hetzel*, 103 Pa. 507, it was said by TRUNKY, J.: "Under the rule admitting parties to testify in their own behalf, where the character of the transaction depends on the intent of the party, it is competent for him to testify what his intention was. His answer, of course, is not conclusive, but to be considered with other evidence," citing authorities from New York and Massachusetts. In *Com'th v. Julius*, 178 Pa. 322, the plaintiff, being met with a release, was asked what induced her to sign it, and was permitted to testify as to her motive and inducement. This was held not to be error. The distinction was carefully guarded between that case and one of contract, where it is settled that one party may not testify to an intent not disclosed at the time; "the thoughts of one party cannot be proved to bind the other." After reviewing the cases upon this last point, it is said: "This, however, is very different from testifying to the fact that false and fraudulent representations were the consideration or inducement to the party's action. This is one of the facts which is always part of the *res gestæ*, and which it was always competent for the party to prove. And, now that the party is a witness, there is no sound reason why he should not prove it by his own testimony;" referring further to the analogous cases of proving that a contemporaneous parol agreement was part of the consideration of a written contract, and a vendor's rescission of a sale for fraudulent representations which were the inducement to sell, in both of which the fact that the agreement or representation was the inducement may be proved by the party himself. So, in *Weaver v. Cone*, 174 Pa. 104, an action for fraudulent misrepresentation by defendant of the price at which he had sold certain stock, in consequence of which plaintiff sold his at the price named, it was held that plaintiff was properly permitted to testify what induced him to sell. The point was made by appellant that whether the defendant's representation was the inducing cause of plaintiff's action was for the jury to determine from all the facts and circumstances, but that to permit plaintiff to state directly the secret motive which induced his action was giving him an unfair advantage, but this court held the testimony proper. These cases seem to settle the present question in our State, and they are in accordance with the general trend of judicial decisions in States where statutes have made

parties competent witnesses. In a note to *Gardom v. Woodward* (44 Kan. 758), in 21 Am. St. Rep. 810, authorities from Maine, New Hampshire, Massachusetts, New York, Maryland, Indiana, Iowa, Michigan, Minnesota, Wisconsin and California are cited as holding such testimony admissible, and it is said that Ohio and Alabama are the only States in which a contrary view is taken. In the present case there was no element of contract. The parties had no communication with each other, but acted independently on their several rights,—the defendant relying on his own judgment, from the appearance of abandonment; the plaintiffs, on their intentions as well as their acts. We see nothing either in sound reason or in the authorities to limit their general competency as witnesses to the latter. If the jury was wrong in crediting their words, rather than drawing a different inference from their acts, the remedy is not with us.

Judgment affirmed.

Orphans' Court.

In re Estate of ROBERT S. HAYS, Deceased.

An executor is bound by the compensation fixed by the testator in his will, unless extraordinary services are required and rendered.

No. 58 Dec. T., 1896. Audit of executors' account.

OVER, A. J.

STATEMENT.

Robert S. Hays died testate, unmarried and without issue, on the — day of October, A. D. 1895, leaving personalty appraised at \$566,682.01; \$92,635.50, being cash in bank, and the remainder stocks and bonds. He bequeathed \$11,000 in pecuniary legacies, made specific bequests of stocks and bonds appraised at \$360,452, and gave the residue of his estate in equal shares to ten residuary legatees. In pursuance of their agreement the stocks and bonds remaining after satisfying the specific legacies have been distributed to them. The testator appointed his brother, Charles Hays, and his nephew, William H. Hays, executors of his will. The will gives Charles Hays certain real estate, a specific legacy appraised at \$21,025, and he is one of the residuary legatees. William H. Hays, the other executor, is bequeathed a specific legacy appraised at \$36,625, and is also one of the residuary legatees. The testator made the following provision for the compensation of his executors: "To each of the executors of this my last will

and testament I bequeath the sum of one thousand dollars, as and for compensation for their services as such executor." In the account filed, which shows a balance for distribution of \$540,259.21, they claim \$17,761.94 commissions, being three per cent. on \$592,064.77, the total debits of the account. To which the following exception was filed:

"Credit item dated August 11, 1896. By cash paid executors commissions, \$17,761.94, is excepted to, being charged without authority, excessive, and in violation of the terms of the trust accepted by said executors, and being an amount far in excess of reasonable compensation for the services rendered."

The executors paid debts and expenses amounting to \$3,255.05, and collateral inheritance tax \$30,788.57.

OPINION. Filed February 8, 1897.

The executors decline to accept the legacy given them as compensation for their services, claim they are legally entitled to reasonable compensation, and that the testator could not limit it. The only cases cited to support their position are decisions of the Maryland Court of Appeals. But as the code of that State fixes the compensation of executors at "not under five and not exceeding ten per cent.," and authorizes the court when a testator bequeaths an executor anything by way of compensation, if it appears to be insufficient, to allow greater compensation, these cases are not in point. See *Handy v. Collins*, 60 Md. 229. If the executors were bound to accept the trust, undoubtedly the testator could not fix their compensation. But as their acceptance was voluntary they are in the same position as if they had made a contract with the testator in his lifetime to perform the ordinary duties of executors for the compensation fixed by him. And if the amount were excessive, these exceptants would have no standing to object to its allowance: *Harper's Appeal*, 111 Pa. 248. In that case the testator gave all his stocks and bonds to H., directed that the dividends derived from the same be paid to her by A., "whom I name as trustee for said bonds and stocks," and gave H. also a legacy of ten thousand dollars. He also gave A. a legacy of five thousand dollars for his services as trustee for H. The fund for distribution being insufficient to pay both pecuniary legacies. It was held by the Orphans' Court that the legacy to A. was a conditional offer of so much compensation for his services as trustee for H.; that by his acceptance he contracted to perform the services for that amount, could not recover more if the compensation were inadequate and dis-

tribution was made to A.'s legacy in full. In affirming the decree Mr. Justice PAXSON said: "That even if the testator placed an extravagant estimate upon the value of A.'s services H. had no standing to object." Subsequently, in *Arnold's Appeal*, 34 PITTSBURGH LEGAL JOURNAL, 184, this trust was held by the Supreme Court to be a dry one, and the stocks and bonds were transferred to H. As the executors here would be entitled to the full amount of the legacy, if it were excessive compensation, if inadequate, surely they should not be allowed greater compensation, unless they rendered more than the ordinary services.

It has been suggested that it is against public policy to permit a testator to fix, or next of kin to agree to, the compensation of an executor or administrator. In *Clark v. Constantine*, 3 Bush. (Ky.) 652, the court said: "A contract to pay one a consideration to induce him to administer upon an estate is not prohibited by law or public policy. The consideration is a good one, and the contract enforceable." To the same effect is *Hubbell v. Olmstead*, 36 Vt. 619.

And the rule in New York and North Carolina seems to be that when it can be inferred from the language of the will that a legacy was given to an executor as compensation for his services, that he is bound by it: *In re Mason*, 96 N. Y. 527; 2 Jones' Eq. N. C. 445.

In this State such agreements have been enforced without this question being suggested. Thus, in *Koch's Estate*, 148 Pa. 159, it was held that one who makes an agreement with the heirs of a decedent to settle up the estate as administrator for a fixed sum will be held to his agreement. And in *Mulligan's Estate*, 157 Pa. 98, that where an executor waives his right to compensation his assignee for benefit of creditors cannot claim, and such commissions are not attachable, and do not pass by assignment as against public policy. And in *Fishmuth's Estate*, 34 W. N. C. 427, that where an executrix by her acts, if not by her agreement, waives compensation her executors after her death cannot set up such claim.

The power of a testator to fix the compensation of an executor has, however, been expressly recognized by our Supreme Court in *Bartole's Appeal*, decided in 1880, and reported in 1 Walker, 77. In that case the testator fixed the compensation to be allowed his executors in his will, the Orphans' Court held they were bound by it, and in affirming the decree the Supreme Court said: "None of the errors assigned are sustained. The appellant accepted the office of executor under a will limiting the compensation he was to receive for his services as such, and it would

have to be a case of extraordinary character which would induce a court to allow more." In *Good's Estate*, 150 Pa. 301, greater compensation was allowed the executor than fixed in the will, but there more than ordinary services were rendered, and the executor "administered the fund as trustee safely and prudently for fourteen or fifteen years." It seems, then, that an executor is bound by the compensation fixed by the testator, unless extraordinary services are required and rendered by him. The presumption being, unless the contrary appears, that when the compensation was fixed and the trust accepted, it was supposed that only the ordinary services would be required of the executor.

There has been no difficulty whatever in settling this estate. It has remained, and is distributed just as it was left by the testator, with the exception that the debts and collateral inheritance tax, about which there seems to have been no dispute, were paid out of the cash on hand. One of the executors had attended to the testator's business for several years before his death, and both no doubt knew approximately, at least, the value of the estate before they accepted the trust. They are also specific and residuary legatees under the will, and as such interested in having the estate properly and economically administered. And although in view of the magnitude of the estate the compensation fixed in the will seems inadequate, yet as none but the ordinary services were rendered, which must have been anticipated when the trust was accepted, the executors can only be allowed the amount fixed by the testator.

It is not necessary therefore to pass upon the question raised by the exceptions as to the commissions claimed being excessive.

For accountant, *W. R. Blair*.

For exceptant, *Kirk Q. Bigham*.

—Policies indemnifying mercantile concerns against "excess losses" caused by the failure or insolvency of customers are construed in *Smith v. National Credit Ins. Co.* (Minn.) 33 L. R. A. 511, and where the insurer made an assignment for the benefit of creditors, this was a breach of the contract, giving the insured the right to recover on a *quantum meruit* without any proof of loss on a policy which had run its full time before the assignment and if policies had run for a portion of the term only the holders were entitled to recover back the unearned premiums for the balance of the term after the assignment.

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PITTSBURGH, PA., FEBRUARY 24, 1897.

In Memoriam.

A Tribute of the Bar of Allegheny County on the Death of Hon. John H. Bailey.

A largely attended meeting of the bar of Allegheny county was held at the rooms of the Allegheny County Bar Association on Thursday, February 11th, at three o'clock P. M., in memory of the late Hon. JOHN H. BAILEY. The meeting was called to order by Stephen C. McCandless, Esq., who proposed the name of the Hon. E. H. Stowe for president of the meeting. This nomination was unanimously agreed to, and Judge Stowe took the chair after stating the object of the meeting in an appropriate address. The following vice-presidents were then nominated and elected: Judges F. H. Collier, J. F. Slagle, John M. Kennedy, Thomas Ewing, W. G. Hawkins, Jr., and M. W. Acheson; and Edwin Z. Smith, Esq., was appointed secretary.

Upon motion the chair appointed as a committee to prepare a suitable minute the Hon. Thomas M. Marshall, the Hon. Christopher Magee, and Thomas C. Lazear, D. D. Bruce, George W. Guthrie, and Charles B. Kenny, Esqs. The committee retired, and presently through their chairman, Mr. Marshall, reported the following minute:

The event which has brought us into communion to-day was in no way unexpected. The long lingering and painful infirmity which culminated in the death of our honored friend and brother, JOHN H. BAILEY, had been known and lamented by us all. It was almost with relief that we learned that mortality was vested with the spotless robes of immortality. How long and nobly he had submitted to physical pain and anguish with a supreme courage which was wonderful, yet characteristic of the man who never shunned duty or evaded just responsibility!

We meet to put on record some slight memorial of his great worth, of his stainless life and precious honor. Born in our own city more than sixty-six years since, he dwelt with us, among his own people. Early in life, his mind looking forward to a career for man's effort, he chose the law as a profession. After attaining his necessary professional education at our Western University, he entered the law office of Reade Washington, an honored member of our bar, who in his own person and bearing gave evidence of the nobility of his descent,

being a relative near in line of the Father of his Country. His daughter, Miss Kate Washington, became the wife of the student; and her devotion and fidelity in their happy union and during his protracted illness is worthy of note. Mr. BAILEY was admitted to the bar on October 9, 1852. He was in our profession until he passed to his rest. He was called temporarily to other duties and trusts,—as clerk of the United States District Court, member of the city councils, editor of a city newspaper; in all these undertakings he was guided and directed by the same earnest, honest and fearless spirit which distinguished him in the subsequent higher duties of his life. In the year of 1877, he was elected to the bench of the Court of Common Pleas No. 1, where he distinguished himself by a singular devotion to the law in a most earnest and fearless service. He never sought to make law. In his own words, in a hard case, "I have sworn to administer the law, *not to make it.*" During his term he gave all his power to the just performance of his high duties. He was prompt in decision; sometimes accused of being brusque and hasty in manner and temper. This was incident to his determined purpose to perform his duty without delay or influence. No right-minded wise person ever doubted that JOHN H. BAILEY was an honest, fearless and upright man, a just judge, who never "feared the face of man," and who before he gave judgment "never to himself had said:" "What will the world say?" He moved in an atmosphere above and beyond suspicion as to emotion or motive. He was absorbed in the discharge of his duty as his mind and conscience directed. To many of us it is well known under what physical and mental suffering he discharged the duties of his position for several years. At times unjust inferences were drawn from his conduct "in the discharge of his judicial duties." He was prompt and decisive in his manner and conduct, yet he was of a kindly, loving nature and never turned his back to a friend or proved forgetful of any duty of friendship.

We have not described or detailed the mental gifts of our departed friend and brother. He was gifted with a clear, unclouded mind, a just sense of right; he was learned in the law, and possessed a courage that was implacable against contradiction, and which without arrogance or dictation of manner could not be denied expression. He had finished his work, and it is well with him.

It is well that we meet to reflect and take a retrospect of our lives. When an event occurs, like the death which has removed one loved, honored and trusted,—one ripe in all that goes to make and enrich manhood,—when the departure is a fact, we look proudly back to his past, and we can truly say that in all the pages of his book of life, there is not one leaf which we would shade from the keenest observation or the strictest scrutiny.

Like the bereft widow found weeping at the grave of a long buried husband, who, when the enquirer said, "Why do you grieve?" made a reply that was divine, "I do not grieve, I weep proudly; he was my husband;" so we are witnesses to the honor, truth and fearless discharge of every duty by him; and there is nothing to regret in his life's work,—nothing which we would seek to amend or change. Those who survive him may weep proudly at his grave.

It was moved by F. C. Osborn, Esq., that the minute proposed be adopted as the sense of the meeting, that it be spread upon the minutes of the several courts and of the Bar Association, and that a copy be sent to the family of the deceased.

Eulogistic addresses upon the life and character of Judge BAILEY were made by Judges Thomas Ewing, J. F. Slagle and Christopher Magee, and by Charles A. O'Brien, Thomas J. Keenan and Edwin Z. Smith, Esqs.; after which the resolution was carried by unanimous vote, and the meeting adjourned.

Supreme Court, Penn'a.

BURK v. HOWLEY et al.

An arrest caused at the instance of one, and with his knowledge and consent, renders the person at whose instance the arrest was made liable to an action of trespass for false arrest and imprisonment. In such a case, even if the arrest is made without his knowledge or consent, if he subsequently became a party to the continuing the imprisonment in the hope of extorting a confession of guilt, he is liable.

An arrest by a police officer without warrant and the detention of the person so arrested for a period of time, where the circumstances are not those of a dangerous emergency, is illegal and makes the officer so arresting liable for damages.

The facts and circumstances which amount to probable cause is a question of law, and whether they exist in a particular case is a question of fact for the jury. When facts which constitute probable cause are in controversy it is the duty of the court to submit them to the jury with instructions as to what facts will constitute probable cause.

Appeal of William E. Howley, one of the defendants, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of trespass brought by Margaret Burk against William E. Howley, Henry Whitehouse and Roger O'Mara.

The facts of the case, appearing at the trial before J. W. F. WHITE, J., were as follows: The plaintiff was a domestic in the employ of the appellant, and was the sole occupant of the defendant Howley's house for some time before and on Sunday night, November 11, 1894. During that night, or the following morning, alarm was given by the plaintiff that the house had been robbed, and investigation developed the fact that a large quantity of silverware had been taken. Howley summoned the assistance of the police, and the plaintiff was taken to the station house by the defendant Whitehouse, an inspector of police, and detained in custody until the 19th of the month. Howley, according to one witness, said, while the plaintiff was in custody: "We will keep her locked up until she confesses. I don't want to punish the girl, I just want to find my silverware. I won't punish her if she will just tell me who assisted her. I don't believe the girl herself did it, but

she had an assistant. All I want is for her to admit the theft." "I am afraid I became indignant and told him I would stand by the girl as I had brought her here." In his testimony Howley denied this.

The defense offered to prove by Officer Kramer, who was detailed by the chief of police, and Roger O'Mara, who had made the arrest, that the facts which were developed by his investigation, together with the declarations of the plaintiff showed reasonable ground to believe that the plaintiff was concerned in the robbery. The court refused to admit the evidence. (Ninth assignment of error.)

The defendant asked the court to charge:—

"If the jury believe that the house of the defendant, W. E. Howley, was robbed, and he made known that fact to the police authorities of the city, and truthfully stated to said authorities, the facts tending to cast suspicion upon the plaintiff as the thief, but that he made no information charging her with the offense, nor caused a warrant to be issued for her arrest, nor had any part in making or directing her arrest and imprisonment, the verdict of the jury should be in favor of the defendant, W. E. Howley."

To which the court replied:—

"This point is too broad, and cannot therefore be affirmed. It is not necessary to a conviction that Howley should have been an active party in making or directing the arrest and imprisonment of the plaintiff. If the arrest was made at his instance, with his knowledge and consent, it is sufficient, although he may not have directed the officer to arrest her. But further, even if the arrest was without his knowledge or consent, yet, if he was a party to continuing her in the lockup in the hope of getting a confession of some kind from her, he then became a party to the illegal imprisonment." (First assignment of error.)

The verdict was for the plaintiff in \$3,250 as against Howley and Whitehouse, and for the defendant as to O'Mara. A new trial was granted as to Whitehouse, and upon the plaintiff filing a release of the amount of the verdict above \$3,000, judgment was entered for this amount against defendant Howley.

Howley took this appeal and assigned error, *inter alia*, as above indicated.

For appellant, *D. F. Patterson and E. J. Kent.*

Contra, Ammon Brothers.

Opinion by DEAN, J. Filed January 4, 1897.

On the night of Sunday, November 11, 1894, the dwelling house of William E. Howley, de-

endant, was entered, and a quantity of silverware and other articles, to the value of \$800, stolen. The plaintiff, Martha Burk, a colored woman, 30 years of age, had been in the service of Howley for about one week, and on the night of the theft slept in the house. She was the sole occupant, and in charge of the house. Howley had just been married, and he and his wife were staying with his mother, who lived next door. The property taken had been kept in the dining room, on the first floor, of the Howley house. Martha on rising in the morning, about 6 o'clock, discovered the robbery, and at once gave the alarm to Howley, next door. He immediately, on examination, directed that nothing be disturbed until he brought an officer. He then left, and soon returned with Officer Kramer, who, in presence of Howley, charged Martha with the theft. She protested her innocence, but was arrested without warrant, taken to the patrol box a short distance off, and from there, in an open patrol wagon, to Oakland police station, placed in a cell, where she was kept eight days and nights, during which time she slept on a wooden bunk, without blankets, surrounded by such vagabonds and criminals in other and adjoining cells as the criminal population of a large city daily empties into a police station house. She alleged that, by this rude treatment and exposure, she was made ill, and contracted rheumatism, which disabled her from service for that winter, besides subjecting her to expense for medical attendance. She had, so far as appears, always borne a good character, and had not before been charged with any crime or misdemeanor. The theft, and her arrest for it, formed the subject of sensational items for the newspapers the same and the next day. She then brought this action to recover damages for false imprisonment against Howley, Officer Whitehouse, keeper of the station, and Roger O'Mara, chief of police. On the trial in the court below, it was shown no information was ever made or warrant lodged against her. In the absence of regular proceedings by information, either before or after her arrest, her detention for eight days was wholly illegal, and the court below so held. There was no evidence connecting Chief of Police O'Mara with either the arrest or imprisonment, and, as to him, the court properly directed a verdict for defendant. As to Howley, the court, in effect, instructed the jury that the arrest under the circumstances, without warrant, and her detention in prison without lodging information against her, were illegal, and those guilty of it were answerable in damages; and, further, that if Whitehouse, even though not concerned in the

arrest, detained her in prison, with knowledge that she had not been arrested on view of the officer in commission of a felony, nor by warrant on information made, he also was answerable to her in damages for the long detention. The jury rendered a verdict for plaintiff against both defendants, for \$8,250. On motion for new trial heard before the full bench, a new trial as to Whitehouse was granted. As to Howley, an order was made that if plaintiff, as to him, released all of the verdict in excess of \$3,000, the motion for a new trial be overruled, and judgment be entered on the verdict for that amount; otherwise, that a new trial be granted to him also. Plaintiff filed the release, and judgment was accordingly entered against Howley for the reduced amount, and we now have this appeal by him.

The appellant prefers nine assignments of error, all except the last alleging errors of law in the charge of the court. The first complaint is to the refusal of the court to unqualifiedly affirm defendants' written point, as follows: "If the jury believe that the house of the defendant W. E. Howley was robbed, and he made known that fact to the police authorities of the city, and truthfully stated to said authorities the facts tending to cast suspicion upon the plaintiff as the thief, but that he made no information charging her with the offense, nor caused a warrant to be issued for her arrest, nor had any part in making or directing her arrest and imprisonment, the verdict of the jury should be in favor of the defendant W. E. Howley." *Answer*: "This point is too broad, and cannot therefore be affirmed. It is not necessary to a conviction that Howley should have been an active party in making or directing the arrest and imprisonment of the plaintiff. If the arrest was made at his instance, with his knowledge, and consent, it is sufficient, although he may not have directed the officer to arrest her. But, further, even if the arrest was without his knowledge and consent, yet, if he was a party to continuing her in the lockup, in the hope of getting a confession of some kind from her, he then became a party to the illegal imprisonment." To a proper apprehension of the scope of this request, and the significance of the court's answer, the facts should be recalled. The arrest presumably was illegal; the detention palpably so. There was evidence on part of plaintiff that her arrest was brought about by statements of Howley to the officer. Kramer, the officer who made the arrest, thus testifies: "Q. You can state whether he (Howley) said anything to you about suspecting her of having committed the robbery. A. He said

somebody on the inside of the house must have opened it, and he said she was the only one on the inside of the house that he knew was there." This witness was put on the stand by defendant, and thereby he impliedly asked the court and jury to credit his testimony, which shows that Howley directed suspicion against the girl, which suspicion had no other foundation than that some one inside the house must have opened it, and she was the only one inside. He does not intimate to the officer the girl's previous good character, which he had satisfied himself of when he employed her the week before, and which, if known to the officer, would have prompted him to caution. Whether these facts would have warranted an information of belief before a magistrate that she was guilty, or whether he would have issued thereon a warrant for her arrest, or whether, on hearing these facts, they would have justified her commitment or holding to bail, were not the questions to be determined. The question was whether Howley, by words or acts, had pointed her out to the officer brought to the house by him as the thief. Howley called the officer to the stand to testify he had so pointed her out. In view of this and other evidence to the same effect, the court refused to affirm the point, and explained why; it was too broad, in view of defendant's own evidence. The court properly said in answer to it: "If the arrest was made at his instance, with his knowledge and consent, it is sufficient, although he may not have expressly directed the officer to arrest her. But, further, it would have been manifest error to have affirmed the point, and to have directed a verdict for defendant, because there was evidence to sustain another ground of recovery. The plaintiff had been illegally imprisoned for eight days. Mrs. Florence Briggs, a highly respectable woman, in whose service plaintiff had been for two or three years, and who had known her for ten years, testifies that Howley called on her the day after the arrest, and after Mrs. Briggs had told him of the plaintiff's established good character, and that the charge of dishonesty against her was incredible, he replied: "We had her locked up, and we will keep her locked up until she does confess, * * * I don't want to punish the girl; I just want to find my silverware. I won't punish her if she will just tell me who assisted her. I don't believe the girl herself did it, but she had an assistant. All I want is for her to admit the theft." There was evidence that frequent visits were made to the station by Howley and his brother, and plaintiff was importuned by them to confess her guilt, which she persistently denied, and that

at last, by direction of Howley, she was released. No comment is needed on such conduct. That a humble citizen, who has always borne a good character, can on mere suspicion, at the instigation of a private person, be arrested, locked up, and detained in a station house, with its disagreeable surroundings, for eight days, without information or warrant, and this with the knowledge of, if not with the connivance of, two officers of the law, suggests its own comment. But there was ample evidence to show she was detained in prison by request of Howley, and that she was not released until he authorized it. His purpose was to extort a confession of guilt, a revival, in a somewhat milder form, of the rack and thumbscrew process to establish crime, and just as flagrantly unlawful. The court was bound to say, in its qualified answer to the point, as it did say: "Even if the arrest was without [Howley's] knowledge and consent, yet if he was a party to continuing to keep her in the lockup, in the hope of getting a confession of some kind from her, he then became a party to the illegal imprisonment." The point, as framed, might properly have been peremptorily denied.

The assignments of error from 2 to 8, inclusive, are mainly to the charge of the court defining the authority to arrest for a felony on reasonable grounds of suspicion, without warrant. The court distinctly said that while an arrest, on an exigency where reasonable grounds of suspicion existed, might be made, it was the duty of the person or officer making the arrest to take the accused before a magistrate for formal accusation and hearing; that the exigency which prompted the arrest on suspicion could not justify such a detention as this, without hearing. In this there was no error. To sustain, however, the charge of error in this particular, appellant cites and relies on *McCarthy v. De Armit*, 99 Pa. 63. That case is, undoubtedly, the law; but the scope of the decision must, to a great extent, be defined by the facts there appearing. It was an arrest made by the direction of Mayor McCarthy, of Pittsburgh. In the aggravated riots of 1877, many persons, more than 20, in efforts to suppress the riots and keep the peace, had been murdered by the lawless. One man, called "Pat, the Avenger," was seen to have shot two of the State troops, and was accused of killing more. Many arrests of rioters were made, but Pat could not be found. A reputable citizen informed an officer that the real name of the accused person was De Armit, and strongly intimated he lived on Forty-Eighth street. The mayor, on investigation, directed his arrest late on Saturday night. On Monday

morning, he was taken before a judge on writ of *habeas corpus*, but was held for a further hearing. On Monday afternoon, a respectable witness informed the mayor that he had seen the man Pat when he shot the soldiers, and had also that day seen De Armit, and De Armit was not the same man. The mayor immediately informed the district attorney of this, and De Armit was discharged by the judge before whom the writ was returnable. De Armit brought suit for damages against the mayor. At the trial, among others, this point was put to the court, and answered: "The testimony of defendant, if believed, does not disclose any ground of probable cause, and the verdict should be for plaintiff." *Answer*: "This point is affirmed." This was generally the purport of the instructions. The verdict was for plaintiff, in sum of \$2,500, and defendant appealed to this court. The judgment was reversed, TRUNKEY, J., in delivering the opinion, after a citation of most of the authorities, saying: "Probable cause does not depend on the state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting. * * * What facts and circumstances amount to probable cause is a question of law. Whether they exist in any particular case is a question of fact. When the facts are in controversy, the subject must be submitted to the jury, in which event it is the duty of the court to instruct them what facts will constitute probable cause, and submit to them only the question of such facts. This principle is well settled. If all the evidence is insufficient to establish probable cause, the court shall so instruct the jury." Then, after advertising to the facts at length, this is the conclusion: "By law, the mayor is the chief conservator of the peace of Pittsburgh. Upon the verity of the testimony adduced by the defendants, the mayor had probable cause to suspect that the plaintiff had committed the crime. The condition of the community during the time covered by the testimony was material for him to consider, with the fact that citizens appeared in fear, and evaded the inquiries of the detective officer. Probably, they feared the mob or the murderer. * * * If the mayor had good reason to suspect, it was his duty to act, to the end that the felon should not escape." The charge before us, in the assignments complained of, in substance instructs the jury that this arrest was without probable cause, or, rather, that there were no reasonable grounds of suspicion. Clearly, there are no facts in this case to which the principle announced in *McCarthy v. De Armit* will apply. De Armit, in a time of turbulence, destruction of property, and murder,

was pointed out to the mayor as one who had deliberately shot two men. He was arrested at the direction of the chief executive of the city, who was doing his utmost to quell the riots. The arrest was at midnight of Saturday, an hour when magistrates are not accessible. On the first juridical day thereafter, Monday, in the morning, he was brought before a judge, and remanded. On the afternoon of the same day, he was discharged. His apprehension without warrant was not, under the circumstances, unreasonable, neither was his detention; and the court below was reversed for peremptorily instructing the jury that the arrest was illegal. But this colored girl was not charged with riot and murder in a time of great public alarm, and suspected of planning an escape. When Howley started, and announced he was going for an officer, she voluntarily remained in the house. He could almost as easily have procured a warrant, and put it in the hands of an officer, and then returned with him, as return with the officer and instigate her arrest without warrant. But why detain her in a cell for more than a week? Obviously, because there were no reasonable grounds of suspicion on which to base an information. His whole subsequent conduct shows that the imprisonment was prompted for the purpose of extorting an admission, without which there was no reasonable ground to suspect guilt. Clearly, if the exigency called for a sudden arrest without warrant, no such exigency existed for the eight days following, every hour of which was an illegal detention.

The ninth assignment is to ruling out part of the testimony of Officer Kramer, a witness called by defendant. Kramer was not a party to the suit. If he had been, the evidence would have been admissible. The offer was to prove a private conversation he had with plaintiff immediately before her arrest, as to the appearance of the rooms, but not in presence of Howley. What she said to Kramer, if Howley did not hear it, would not protect him, for Kramer testified positively that the arrest was made partly at Howley's suggestion, and not solely on his own responsibility. The only effect the testimony could have had, if admitted, would have been to show that Kramer ought to have been joined in the suit with Howley. Of two joint trespassers, the plaintiff could sue both or either; and, if she proceeded against but one, that one could not relieve himself from responsibility by showing the other participated in the illegal act.

As the constitutional mandate, that "the people shall be secure in their persons, houses, pa-

pers and possessions, from unreasonable searches and seizures" (Article 1, § 8), is still in force, we think the judgment should be affirmed. It is affirmed accordingly.

Court of Common Pleas No. 1.

In re Application of JOHN DOUBT.

Letters Rogatory—Practice under Act of April 8, 1833, sec. 18, P. L. 308—Comity between States.

Where an application is issued out of a court in another State under seal of that court, entitled "Letters Rogatory," requesting the aid of a court of this State to compel the attendance of witnesses therein named, before this latter court, or before a commissioner to be appointed by this court, to give testimony by depositions to be used in a case pending before said foreign court, said application will be refused unless it is accompanied by interrogatories filed in the foreign court and attached to the said application.

No general order to examine witnesses *via voce* can be granted under said act, but the examination thereunder must be confined to stated questions filed in the court whence the letters proceeded and attached to the letters rogatory.

Where a citizen of Allegheny county, Pennsylvania, instituted proceedings in an Ohio court, and procured service upon a resident of Pennsylvania, or a Pennsylvania corporation, upon whom service of process might have been made in the county of the plaintiff's residence in this State, he cannot invoke the law of comity under the Act of April 8, 1833, § 18, to aid him in procuring depositions of witnesses resident in Allegheny county for use upon the trial of the case in Ohio.

Before Judges STOWE, COLLIER and SLAGLE.

John Doubt, a resident of Allegheny county, Pennsylvania, while working for the Pittsburgh & Lake Erie Railroad Company, as a fireman, was injured in a collision between two trains of that road in the State of Pennsylvania.

He thereupon, still retaining his residence in Allegheny county, instituted suit in Mahoning county, Ohio, against the Pittsburgh & Lake Erie Railroad Company for damages, resulting from his injuries, and procured service of summons upon the defendant, it being a corporation of both Pennsylvania and Ohio.

Having failed to get the depositions of certain witnesses in Allegheny county, under Ohio practice, because of the lack of authority upon the part of the justice of the peace in the State of Pennsylvania to compel the attendance of witnesses before him to give testimony in a suit pending in another State, the attorneys for Doubt procured a written application signed by the judge of the Common Pleas Court of Mahoning county, and certified under seal of that court, a copy of which is as follows:

THE STATE OF OHIO,
MAHONING COUNTY, } ss.

To any judge or tribunal having jurisdiction of civil cases in the State of Pennsylvania, and especially the President Judge of Allegheny county, Pennsylvania:

GREETING:

Whereas, in a certain action as above stated, pending before our Court of Common Pleas aforesaid, in which John Doubt is plaintiff and the Pittsburgh & Lake Erie Railroad Company is defendant, it has been suggested to us that there are witnesses residing within your jurisdiction without whose testimony justice cannot be completely done between the said parties.

We, therefore, request you that you in furtherance of justice you will by the power and usual process of your court cause the following named witnesses if within your jurisdiction, to wit: W. R. Thannon, John T. Keith, Joseph Dunlap, Harry Coon, to appear before you or some competent person by you for that purpose to be appointed or authorized and at a precise time and place by you to be there to answer on their oaths and affirmations to such questions as may be put to each of said witnesses so pointed out, and that you will cause their depositions to be committed to writing and returned to us under cover and sealed up, together with these presents, and we shall be willing and ready to do the same for you in any similar case required. And it appearing to us that justice cannot be fully done in the premises by taking such depositions by their answers to interrogatories filed before hand, we do request of you that you will permit and cause such examination to be made *via voce*, permitting counsel for the respective parties to be present and ask such questions as may seem to them fit, not requiring of you that you shall determine either the relevancy or competency of such.

We have required of the plaintiff moving for these letters that he shall give three days' notice to defendant of the time and place of taking such depositions when you shall have fixed the same and of the time of his application to you for the execution thereof.

Witness, etc.

Application was then made to the Court of Common Pleas of Allegheny county for an order to compel witnesses named in the foregoing application to attend.

For plaintiff, *R. B. Murray* and *A. Leo. Weil*.

For defendant, *J. P. Wilson* and *Knox & Reed*.

Opinion by SLAGLE, J. Filed February 6, 1897.

In pursuance of notice, counsel for defendant appeared and objected to any action by this court. No formal objections were filed. This would have been better practice, as it would have enabled the court to dispose of the questions more methodically and with more certainty of considering all the questions raised. These, however, are well presented by the brief furnished by counsel for plaintiff.

The first objection suggested is that these are not letters rogatory because they are not accompanied with interrogatories, and the proposed mode of examination is unusual and unauthorized.

To this plaintiff replies that the Act of April

8, 1833, Purd. 814, p. 66, makes it obligatory upon that court to issue process whenever letters rogatory were presented, and that the sufficiency and regularity of the letters cannot be questioned by this court, but must be left to the judgment of the court by which they are issued, and that the only question for this court is whether they are letters rogatory.

We cannot fully assent to either of these propositions.

The Act of 1833 merely recognizes a form which always existed in judicial tribunals and prescribes the mode by which it may be made effective. This power rests upon comity which in itself implies the right to exercise judicial discretion. The words of the act do not deprive the courts of this discretion, and surely it never could have been intended to make the courts of this State the unquestioning and perhaps unwilling agents of a court of another State, whether that court was right or wrong. It may be admitted that the comity of nations in this matter has the force of law, but it still leaves to the court, whose power is invoked, the right to determine as to the legality and rightfulness of its exercise. Every presumption must be in favor of the legality and regularity of the demand made by a foreign court, but it is not conclusive. It is not enough to call papers "letters rogatory," they must be such in fact. If the objection is that they do not conform to the general law which governs all courts, that may be determined by the court to which they are addressed. If the objection is that they are not in accordance with the laws or practice of the courts of the State from which they come, they must be determined by the courts of that State: *McKenna's Case*, 2 Parsons, 227.

Are these letters in proper form?

There is no suggestion that the State of Ohio has any special law or practice governing such proceedings, and their regularity must be determined by the general law on the subject. Counsel have produced no case in which it has been held that letters rogatory may be issued without interrogatories. He refers to *Troubat & Haley*, *Greenleaf's Evidence*, and some authors on Admiralty Practice, in which expressions are used which indicate that in proper cases depositions may be taken in that way, but furnished no case in which it was done. So far as we can ascertain the universal custom has been to attach interrogatories to the letters. This is apparent from the fact that every standard law dictionary defines letters rogatory as a letter requesting the latter to cause to be examined upon interrogatories filed, etc. See *Bouvier*, *Am. & Eng. Ency. of Law*, *Anderson*,

etc., and the form books provide for interrogatories: *Smith's Form*, 593.

This is the form used in this case, striking out the words "to the several interrogatories hereunto annexed," and inserting the words "to such questions as may be put to each of said witnesses."

This indicates very clearly what is the usual and ordinary form of proceeding, and when such a request is presented it would be our duty and should be our pleasure to grant the request and furnish the desired aid, but we are not bound to respond to an unusual and extraordinary request.

This is not a technical and immaterial objection. This departure from the ordinary practice required a further unusual request "that you will permit and cause such examination to be made *viva voce*, permitting counsel for the respective parties to be present and ask such questions as may seem to them fit, not requiring of you that you shall determine either the relevancy or competency of such questions asked."

The effect of this is apparent. Counsel might subject a witness to an inquisitorial examination upon any and every subject, but the controversy in this case and this court would be powerless to prevent it. It is not probable, but it is possible, that this would be done, and the possibility shows its impropriety. It is not always within the power of the court in ordinary proceedings to restrain counsel within proper limits and protect a witness from improper examination.

Witnesses are entitled to the protection of the court, but under this order the only power the court would have would be to compel the witness to answer any question that to counsel may "seem fit," without regard to its relevancy or competency, and though it may be manifestly offensive or even insulting or injurious to the witness. It would tie the hands of this court to prevent the abuse of its own process. No rule of comity requires us to subject any citizen of this State to the possibility of an improper exercise of such an irresponsible power. Nor do we think that any court should issue its process and preside at its execution with the power to enforce and none to restrain, even if it had the right to do so.

It may be said that it was not intended to have such an effect. But we are dealing with the paper as presented, and this is certainly a possible result.

In support of this proposition counsel for plaintiff refers to the opinion of Judge *Knox* in *McKenna's Case*, 2 Parsons, 237, that the rele-

vancy and competency of the testimony is exclusively for the decision of the court, which issues the letters. But that was a case in which interrogatories were attached, and the court was presumed to have examined them before the letters were issued. It is inapplicable to a case like this where the court has submitted the questions as to the relevancy and competency to counsel conducting the examination. It may be answered that the competency and relevancy of the testimony will be determined by the court when it has been returned. This might be sufficient to secure a fair trial of the case, but in the meantime it may do great injustice to the parties, to the witnesses or to persons having nothing to do with the case.

It seems to us that where the court issuing the letters had not examined the interrogatories and passed upon their competency and relevancy—what questions shall be asked and how answered—becomes a part of the procedure, which must from the nature of the case be altogether under the control of the foreign tribunal which is appealed to for assistance in the administration of justice: *Kruhling et al. v. Leberman*, 9 Phila. 160.

The objections considered arise upon the papers presented to us. But there were other objections suggested upon facts which do not appear on the papers. It was alleged and admitted that the plaintiff is a resident of Allegheny county, and that the principal is a resident of Allegheny county, and that the principal witnesses also reside here; that the injury complained of occurred in the State of Pennsylvania and that the defendant is a corporation chartered by both States of Pennsylvania and Ohio, operating a railroad in both States, but having its headquarters in Allegheny county.

It is conceded that the plaintiff had the right to bring his suit in Ohio, but it is claimed that under the circumstances our courts are not bound and ought not to grant assistance to a person who has gone out of our jurisdiction for some purpose not disclosed, that the exercise of comity does not depend upon the courts alone, but is to be determined by the status of the parties as well. This seems to have some force.

In *Bagley v. Railroad*, 86 Pa. 291, our Supreme Court held that a citizen of Virginia, who came into this State to seize by attachment a fund which he could not have taken in Virginia, was not entitled to the process of our courts.

But this objection, we think, should be addressed to the court which was asked to issue the letters, but it is proper for consideration by this court also.

But there is a more serious objection in the fact alleged at argument, and not denied, that the purpose of plaintiff in going into Ohio was to avoid the rulings of our courts as to the ground of liability of defendant; especially as to the effect of negligence of a co-employee and contributory negligence of plaintiff.

It is one of the first principles of the exercise of comity that it will not be given at the expense of injustice to the citizen of the State to which the appeal is made: *Bagley v. Railroad*, *supra*.

If one of our citizens temporarily in another State should be served with process at the suit of another citizen who had followed him and brought his suit for the purpose of obtaining an advantage which he could not get under our laws, we might not be able to prevent it, but surely we could not be called on to assist him in effecting his purpose, even under the plea of comity to the courts of that State. Take for instance our Act of April 15, 1845, exempting the wages of labor from attachment in execution. Suppose a citizen of this State, being a creditor of an employee of a railroad operating in this and an adjoining State, should by process of a court of that State attach the wages of such employee, being a citizen of this State, with the purpose or effect of avoiding this law; although we might not be able to prevent, if the process of that court were sufficient to enforce the claim, if our assistance were required to make it effective, there is certainly no principle of law or rule of comity which would require us to grant it. We are not bound to assist in enforcing claims in violation of our own laws in favor of a citizen who voluntarily and without necessity goes outside our jurisdiction to avoid them. And it does not matter whether the rights of the parties depend upon statute or in the common law as interpreted by our courts: *Knight v. West Jersey Railroad Co.*, 108 Pa. 250; *Usher v. West Jersey Railroad Co.*, 128 *Id.* 206.

In this case, though the defendant company is a corporation of Ohio, it is also a corporation of Pennsylvania. It could have been served here and any judgment obtained against it enforced here as well as there. The plaintiff and his witnesses are here and the injury occurred here. There is no apparent reason why the suit was not brought here.

We are of the opinion that the application for our action is irregular in form, that it is liable to abuse, and that the plaintiff is not entitled to the exercise of comity in his behalf, and we, for these reasons, respectfully decline to accede to the request of the Court of Common Pleas of Mahoning county.

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Supreme Court, Penn'a.

TAYLOR v. SATTLER.

A. entered into a written agreement with B. to complete an oil well. On running in the tools A. discovers the well was in bad condition, and B. then agreed to pay him for cleaning it out. In an action by A. against B. on this verbal contract the written agreement may be put in evidence for the purpose of explaining the verbal agreement.

Appeal of John Sattler, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* brought by W. S. Taylor.

The statement in this action, brought originally against John Sattler and Morris Einstein, set up that the parties had entered into the following agreement in writing:

Articles of agreement made and entered into this 30th day of September, 1890, between Mr. John Sattler and M. Einstein of the first part, and Mr. W. S. Taylor, of Petrolia, of the second part. The party of the second part agrees to complete a well on Opperman farm, Ohio township, to the depth of 2,000 feet, and if oil or gas is found in paying quantities in the 100 feet, the parties of the second part are willing to cease, at the option of the parties of the first part. Parties of the second part will furnish all tools necessary to drill said well except boiler and engine and pipes to connect with steam and pipes for water well adjoining the derrick. The party of the second part agrees to drill said well for \$1,333.33. The party of the first part agrees to pay party of the second part \$200 when the casing is in the well, and balance when the well is completed. The party of the second part agrees to start with due diligence.

JOHN SATTLER,
W. S. TAYLOR.

That upon running tools into said well plaintiff discovered that it was not cased to a depth of 960 feet and was not clear or in good order, but was caved in at a depth of about 625 feet; that plaintiff at once notified John Sattler, one of the defendants, who acted for himself and his co-defendant, of the condition of said well, and thereupon defendants employed the plaintiff to clean out said well and put it in the condition it was represented to be, and authorized him to procure such tools and material and employ such help as plaintiff deemed necessary to accomplish said purpose; that in pursuance of such employ-

ment, plaintiff proceeded to clean out said well and worked thereat himself for a number of days, and employed the services of other persons. For the work done under the alleged contract and for loss of profits, the plaintiff claimed to recover \$2,410.30.

On the trial, before J. W. F. WHITE, J., the plaintiff amended by striking out the name of Joseph Einstein as a defendant. The plaintiff also offered in evidence in connection with testimony as to work done under the oral contract and the circumstances under which it was made, the above quoted written contract. Objected to. Objection overruled, the court saying: "The agreement is not the basis of this action as it is now presented before the court; but the verbal arrangement alleged by the plaintiff to have been made with Sattler was in consequence of this written agreement, and so far as it bears upon the verbal arrangement between the plaintiff and Sattler, it is competent evidence, and for that purpose, and that alone it is admitted in evidence." (First assignment of error.)

The defendant submitted, *inter alia*, the following point:

1. "That as the evidence shows that plaintiff and L. N. Sawyer were partners in the contract sued upon, that plaintiff cannot recover in this action." *Refused*. (Third assignment of error.)

The court charged that there could be no recovery if the claim were upon the written contract, but submitted to the jury to find whether there had been any contract between the plaintiff and John Sattler.

Verdict for plaintiff for \$1,268 and judgment thereon. The defendant took this appeal and assigned as error, *inter alia*, the rulings above indicated and also the charge of the court, submitting the question, for the following reasons:

1. The action was against Sattler & Einstein, and the court should not have submitted the question whether or not there was a verbal contract or not with John Sattler and the appellee to the jury.

2. Because the statement charges liability on Sattler and Einstein and the same has not been amended except as to the elimination from the record of Morris Einstein.

3. The court should have withdrawn the case from the jury, or have instructed the jury to find for the defendant, for the reason that the *probata* does not agree with the *allegata*.

For appellant, *James Fitzsimmons, J. K. Wallace and A. H. & H. H. Rowand*.

Contra, J. M. Stoner and F. B. Stoner.

Opinion by STERRETT, C. J. Filed January 4, 1897.

This action of *assumpsit* is not on the written agreement to complete the oil or gas well, but on an alleged verbal contract to clean out the well and put it in the condition in which, as alleged by plaintiff, it was represented to be in at the time the written contract was executed. There was therefore no attempt to substitute a verbal contract for a written one, and the admission of the latter in evidence was merely as explanatory of the testimony relating to the verbal contract on which alone plaintiff relied. As thus restricted it was not improperly admitted.

When the record was amended by striking out the name of the other defendant, mentioned in the written contract, the plaintiff's statement—part of the record—is to be considered amended so as to conform thereto. If a more formal amendment were required, it may be allowed and filed here, so as to make the trial on the merits conform to the record and the evidence.

The testimony as to plaintiff's partnership with a third party referred to the written contract, and as that instrument was not involved in this action, the question of partnership was not in the case.

Plaintiff's right to recover depended on satisfactory proof of the alleged verbal contract; and that was a question of fact for the jury. After saying to them that there could be no recovery on the written contract, because it had never been completed, etc., and referring to the somewhat conflicting testimony as to the verbal contract, the learned trial judge submitted the question, whether, as claimed by plaintiff, there was a verbal agreement between him and the defendant, as to cleaning out the well, etc., and if so what were its terms and how much, if anything, was due the plaintiff thereunder. By necessary implication, the fact that there was a verbal contract, as claimed by plaintiff, has been established by the verdict, and the amount thereunder has been found. There appears to be no substantial error in the proceedings, leading up to these conclusions of fact; nor is there anything in either of the specifications of error that requires further discussion.

Judgment affirmed.

SMITH v. REIMER.

In an action to recover a *quantum meruit* for services rendered as a nurse to a decedent, where it appeared that the services were rendered by the plaintiff in a house belonging to the decedent, that she occupied part of the house and furnished him with board for which he paid

week by week for years, evidence of the average price of board per week, and of the value of the portion of the premises occupied by the plaintiff, is not admissible to reduce the plaintiff's claim; the board having been paid by the decedent in his lifetime, and the character of services to be rendered to the decedent requiring that the plaintiff should live in the house with him, the relation was that of master and servant, and not that of landlord and tenant.

Appeal of Andrew Reimer, executor of George D. Reimer, deceased, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* in which Annie E. Smith was plaintiff.

This action was brought by Annie E. Smith to recover compensation for services rendered by her to Dr. Reimer during his alleged illness, from the year 1883 up to and including his last illness, ending with his death on November 26, 1891. The statement alleged that in February, 1883, Dr. Reimer made a proposition to plaintiff that he would build a house on a lot of ground belonging to him, and that if she would move into and occupy part of that house, with her family, and permit him to occupy the remaining part, to wit, four rooms, during his lifetime, and board him, take care of him, do his mending and washing, keep his rooms in order, during his lifetime, he would pay her six (\$6) dollars per week for his board and give her the house and lot for her services in taking care of him, doing his mending and washing and keeping his rooms in order during his lifetime; that she accepted the proposition; that the house was built, that she moved into it in September, 1883, with her family; that Reimer went with her, and occupied the four rooms until his death, November 26, 1891; that during all that time she complied with her agreement, by boarding him, taking good care of him, keeping his rooms in order and nursing him during his last sickness, which she alleged was continuous from January 16, 1888, to his death. The statement admitted that the six dollars per week had been fully paid, except for the last week of Reimer's life, which had not been paid, and claimed to recover for taking care of him, doing his mending and washing, keeping his rooms in order and nursing him during his sickness and for the use and destruction of plaintiff's bed-clothing and furniture, in attending to his needs immediately before his death.

On the trial, before J. W. F. WHITE, J., the testimony given to sustain the alleged contract was that of the plaintiff's daughter, Ada, who testified that she was 14 years of age on February 11, 1883, and that the bargain was made in February, 1883. She was not requested by anyone to note the arrangement, but was simply

listening because she wanted to know what was being said. In her examination she testified as follows: "He told mother he was going to build a house containing eight rooms (this was in February, 1883), and that mother was to go out there and keep house for him; she was to have four rooms and he was to have four; one was for his brother, Mr. Andrew Reimer, and he was to pay his board, which was six dollars a week, and mother was to do all the housework and his washing and mending, and at his death (Dr. Reimer's death) the house was to be mother's and his brother, Andrew, was to remain there as long as he lived; he was to have two rooms, bed room and office. * * * He said that when he was sick mother was to take care of him and that he expected to be a long time, may be lay sick four or five years, because his father done the same, and he was the same as his father." She also said that her mother agreed to the proposition.

The rendering of the services having been proved, the defendant made the following offer:

"We propose to show by the witness on the stand and other witnesses what the average market rates for table board were in the neighborhood in which the plaintiff and Dr. Reimer resided during the time covered in this action, and also to prove what was a fair rental value for the house in which the parties lived, so far as the same was occupied by the plaintiff; this for the purpose of aiding the jury in determining what the real arrangement between the plaintiff and Dr. Reimer was."

Objected to as incompetent, for the reason that this is a suit brought on an express contract, and the question of boarding is not in issue.

The court sustained the objection saying:

"The plaintiff seeks to recover on a contract made, and not a *quantum meruit*, and the question will be on the contract, and I cannot see that this testimony bears at all on the contract; therefore the objection is sustained." (Second assignment of error.)

Defendant also made the following offer: "We propose to show by the witness on the stand, and other witnesses, what the average market rates for table board were in the neighborhood in which the plaintiff and Dr. Reimer resided, during the time covered in this action, and also to prove what was a fair rental value for the house in which the parties lived, so far as the same was occupied by the plaintiff; this offer being renewed for the purpose of showing in connection with the evidence already in the case the amount paid by Dr. Reimer on account

of all the services rendered by the plaintiff, including boarding and attendance." Objected to and objection sustained for the same reason as given in sustaining the former objection to the former offer. (Third assignment of error.)

Verdict for plaintiff, \$1700 and judgment thereon. The defendant took this appeal, and filed assignments of error, *inter alia*, as above indicated.

For appellant, *John S. Ferguson, John S. Robb and Bruce Millar.*

Contra, S. R. Huss.

Opinion by WILLIAMS, J. Filed January 4, 1897.

The plaintiff's claim in this case is for services rendered in the nursing and care of defendant's intestate, in pursuance of a parol contract. The plaintiff asserts that Dr. George O. Reimer having reached old age, and finding himself too infirm to continue the practice of his profession, made a contract with her to board, nurse and care for him during the remainder of his life. The terms of the alleged contract were that Dr. Reimer should build a house upon a lot owned by him, containing eight rooms. Four of these were to be for his own use, and four for the use of Mrs. Smith and her family. Here she was to board and nurse him while he lived, and he was to pay her six dollars per week for his board and give her the house for the care and attention he might require. He built the house as proposed and took possession of four of the rooms. The other four were taken possession of by Mrs. Smith and her family and the occupancy was unchanged during his life. She began the board and care of Dr. Reimer in 1883, and continued her services until his death in 1891. During the last four years of his life he suffered greatly from disease, including paralysis, and became almost helpless. The service required of Mrs. Smith became more severe and unpleasant, and were frequently loathsome. He died without having secured the house to Mrs. Smith by will or any other form of conveyance. The contract having been wholly parol could not now be specifically enforced because of the statute of frauds.

The plaintiff seeks to recover in this action for the services rendered under the contract; not the contract price, but the reasonable value of the nursing and attendance. The boarding, except for the last week of the doctor's life, had been settled by the parties during the entire eight years, without any disagreement. So much of the contract as related to this subject was not in controversy. The jury had, there-

fore, to inquire in the first place whether Mrs. Smith had nursed and attended Dr. Reimer under a promise that she should be paid for her services; and if so, what the services so rendered were reasonably worth. This was the limit of the controversy as made by the pleadings and the evidence. The evidence on the part of the plaintiff was sufficient to take these questions to the jury. The defendant then offered, *inter alia*, to show by witnesses what was the average price per week for board in the neighborhood in which the parties lived, and what would be a fair rental for the part of the house occupied by Mrs. Smith. This was objected to because no question about the price of board was raised, and it had been paid for regularly during the whole time it had been furnished. The objection was sustained and the rejection of this evidence constitutes the first assignment of error. The same proof was again offered for the purpose of showing "the amount paid by Dr. Reimer on account of all the services rendered by the plaintiff, including boarding and attendance." It was again objected to, and again excluded, and the exclusion is the subject of the third assignment of error. These assignments have been earnestly pressed upon our attention, but we are not persuaded that the evidence offered was relevant to any question properly before the jury. If the services for which the plaintiff sued had been rendered under a promise that they should be paid for, the plaintiff was entitled to recover whatever they were reasonably worth. The average price paid for board in that neighborhood had really nothing to do with the subject in controversy. The same thing is true of the value of the rental for the part of the house occupied by Mrs. Smith. There was nothing to show that rent was to be paid, or that it had ever been considered by the parties. The services to be performed under the alleged contract, and that were actually rendered by the plaintiff, were of a character that made the presence of Mrs. Smith near the person of her charge absolutely necessary. Their relations were not those of landlord and tenant, but of master and servant, a comparatively helpless invalid, and an almost constant attendant. There was nothing in the case as the evidence stood when these offers were made and rejected, that made them relevant to the questions in controversy and their admission would have tended to confuse and mislead, rather than to aid the jury. On an examination of the whole case, we are unable to sustain the assignments of error. The case was well tried by the learned judge of the court below, and the judgment is now affirmed.

ROSS' APPEAL.

Act June 6, 1893, P. L. 330, § 1, 2, providing that, when school directors "shall willfully neglect or refuse" to provide suitable school buildings for the accommodation of all the children of the district, citizens thereof may petition the Court of Common Pleas for appointment of an inspector, who shall inquire into the facts and report the result of his inquiry, accompanied by statement of facts and proofs, and if he finds the directors have refused or neglected to provide accommodations as required, "without valid cause," he shall so report, and thereupon the court may grant a rule on the directors who "have failed without justifiable excuse," to perform the duties enjoined, to show why they should not be removed, gives the court power, not merely in case of willful neglect and refusal by the directors, but to ascertain the facts and determine whether the directors have exercised a sound discretion in providing suitable building accommodations for all the school children of the district.

On report being made by an inspector appointed under Act June 6, 1893, P. L. 330, to inquire into the facts relative to neglect of school directors to provide suitable school buildings, which act provided that he shall report the result of his inquiry, accompanied by a statement of facts and proofs, and if he finds the directors have refused or neglected to provide accommodations as required, without valid cause, he shall so report, and thereupon the court shall grant a rule on the directors to show why they should not be removed, the court may draw inferences from the facts different from those drawn by the inspector.

A decree of the Common Pleas reviewing, under Act June 6, 1893, P. L. 330, the discretion of school directors as to providing school buildings if reviewable, will be disturbed only for manifest abuse of discretion.

Appeal of Tim Ross and others from the order of the Court of Common Pleas of Greene county, discharging a rule on G. S. Walker and others, school directors of Washington township, to show cause why they should not be removed from the office of school directors.

This was a proceeding under the Act of June 6, 1893, P. L. 330, for the removal of certain school directors. The facts appear in the opinion of the Supreme Court, *infra*. The court, DICKEY, P. J., after considering the report of the inspector appointed under the act, and who found that there were not sufficient school accommodation, discharged, at the cost of the petitioners, a rule on the directors to show cause why they should not be removed. The petitioners for the proceedings, Ross and others, took this appeal, and assigned as error the discharge of the rule.

For appellant, James J. Purman and Frank W. Downey.

Contra, Wyly, Buchanan & Walton.

Opinion by DEAN, J. Filed January 4, 1897.

The Act of June 6, 1893, P. L. 330, provides in section 1, that whenever the school directors of any district "shall willfully neglect or refuse"

to provide suitable school buildings and rooms for the accommodation of all the children of the district, ten or more taxable citizens of the district may petition the Court of Common Pleas for the appointment of a competent inspector, whose duty it shall be to visit the district, and on notice to the school board, inquire into the facts and report to the court under oath, the result of his inquiry, accompanied by a statement of facts and proofs.

Section 2 provides, that if the inspector finds the directors have refused, neglected or failed to provide accommodations as required "without valid cause for such refusal, neglect or failure," he shall so report to the court, and thereupon the court is authorized to grant a rule on the school directors to appear and show cause why they should not be removed from office and others appointed in their stead until the next annual election for school directors.

Under this act, the appellant and eighteen other taxable citizens, setting out in detail that the directors of Washington school district, within whose supervision fell Boyd's sub-school district, had willfully neglected and refused to provide building accommodations for the children of said sub-district, petitioned the court for the appointment of an inspector. The court appointed Mr. Levi Taylor, who was a non-resident of the district, and his selection was entirely satisfactory to the school directors. He went upon the ground and for three days investigated, heard patiently all the proofs and allegations of both parties, and after deliberate consideration, reported to the court that the directors had, without valid cause, failed to provide adequate accommodation for the school children of the sub-district. He sets forth fully the reasons for his report, and accompanies it with statements of facts and proofs as required by the act. On this report, the court granted a rule on the directors to show cause why they should not be removed from office. To this rule, one of the directors, G. S. Walker, made answer, in substance admitting the correctness of the report of the inspector, but, being in a minority, averring that he was powerless to remedy the evil complained of by the petitioners. The remaining five directors made answer, averring that in the exercise of their best judgment and discretion they had provided a school building ample for accommodation of all the children of the district. They set out in particular the number of children, their distance from the school house, and the capacity of the building, and aver oath they have performed their full duty to the best of their judgment.

The court below, after a full hearing, discharged the rule, and we have this appeal by petitioners, assigning for error the decree of the court.

Although the court below filed no opinion, we presume the decree was based on a proper construction of the Act of 1893.

Up to the passage of this act, without citing the many cases which determined and defined the duties of school directors, the case of *Roth v. Marshall*, 158 Pa. 272, gives concisely the construction of the Act of 1854 in all of them. In that case we said:

"The subject of controversy in this case is the location of a district school house. Reduced to its simplest terms, the question raised is whether the exercise of official discretion of a board of school directors shall be supervised and directed by a court of equity. If so, the selection of teachers and text books, the fixing of the rate for the levy of school and building taxes, the arrangement of the course of study, together with other similar duties, will be hereafter done subject to the opinion of the courts. The administration of the school laws will in that case depend upon the discretion of a chancellor, whose decrees will be enforced by injunctions or mandatory order. Such a conclusion would do violence to the school laws, and to the well settled rules that fix the limits of official discretion. If an officer neglects or refuses to enter upon the discharge of a duty which the law imposes upon him, the courts will quicken or compel action by a writ of *mandamus*. If he goes beyond what the law requires, attempts that which is *ultra vires*, or abuses his discretion in any manner, the courts will restrain him by injunction. The ground intermediate these extremes is the legitimate range of official discretion within which the officer on whom the law has cast a duty may determine the manner of its performance."

But it is clear to our minds, the intent of the Act of 1893 was to change the law to some extent as it thus plainly stood under the Act of 1854. Under that law, the court would compel the directors to act and restrain them from committing unlawful acts, but would not interfere with them in the exercise of their unquestionable powers; would not determine whether their discretion was wise. While from the beginning the policy of the State was to educate all the children of the State, the administration of the school law was entrusted almost wholly to the particular locality constituting the school district. The advantages of the system for many years were far from uniform. In one district would be found excellent teachers, ample and

comfortable school rooms, with suitable school apparatus, and a term of eight to ten months. In another district, perhaps, in the same county, would be found incapable teachers, rude and insufficient buildings, not supplied with any of the aids to teaching, such as globes, blackboards and other school furniture, with a term of four months. The Act of 1854 was intended to raise the character of the schools and stimulate uniformity; and all the legislation since that time has been for the promotion of the same end. Prior to 1874, the State appropriations for school purposes were comparatively small. Nearly the whole fund for building and school purposes was raised by local taxation in the respective districts. But in Constitution of 1874, section 1 of Article X., directed that, "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose." The school system had then been in operation forty years, yet statistics demonstrated that a large percentage of even Pennsylvania born children grown to manhood and womanhood under the public school system were illiterate. The school laws as administered had not accomplished nearly to the full extent the purpose of its founders. Hence the mandate of the new Constitution. The implication is the fund raised by local taxation has not been sufficient; it must be liberally supplemented by State aid. The Legislature has not limited the appropriation to the amount prescribed by the Constitution. At the last session, five million five hundred thousand dollars were appropriated for common schools alone, to be apportioned among all the districts for the years 1895 and 1896. The object of these large appropriations was to add to the efficiency of the schools. It was not intended by increasing this efficiency to thereby wholly impose the increased expense on the districts to be raised by local taxation and it is just as clear it was not intended the school districts should shift the burden on the State by largely reducing local taxation. If that were the result, nothing would be gained in efficiency. It will therefore be noticed in all the legislation pertaining to the subject since 1874, there has been manifest an intent on the part of the State, not only to stimulate local efficiency by large appropriations, but to compel it by closer supervision and some assumption of control on part of the State. The conditions annexed to the right of a school district to receive its share of the appropriation, laws for uniform

text-books, the aid to normal schools for education of teachers, the compulsory education law and others, all show this dominant idea. And there is no doubt, however vaguely expressed, that the Legislature intended by the Act of 1893 to confer a certain power of supervision of the discretion of school boards on the State courts, which, under the Act of 1854, they did not theretofore have. The first part of section 1 says, if the directors "shall willfully neglect or refuse" to provide houses, rooms, or buildings, then on petition of ten or more taxable citizens, the court shall act. It is argued these words only give to the courts the same power they had exercised under the Act of 1854. Standing by themselves this argument would be plausible; but the whole act must be considered in ascertaining its intent. We ought to assume to start with, that the Legislature would not unnecessarily duplicate on the statute book a well established power already possessed by the courts; must assume that some change was intended. On reading further in the first section, we find the court is expressly authorized to appoint an inspector to inquire into the facts alleged in the complaint, and he shall make a personal inspection and investigation. This imposes upon the court the duty, through its own appointee, of investigation and putting upon record the facts and testimony. If the inspector then finds, that "without valid cause" the directors have neglected or refused to perform their duty, he shall report. It will be noticed the words "willfully neglected and refused" are here dropped, and the words "without valid cause" substituted; words not by any means importing the same thing. If a duty be enjoined on an officer, his refusal to perform it is willful. He has no discretion as to its performance. But if he be commanded to do a certain act unless he have a valid cause for not doing it, and he then refuses for cause, the question is at once raised between him and his superior, whether the cause is sufficient to excuse him in his disobedience; it brings the judgment and discretion of the subordinate at once under the supervision of his superior. And further reading of section 2 bears out this view. It says the court is empowered to grant a rule on those directors who "have failed, without justifiable excuse," to perform the duty enjoined. The material facts alleged here are not in dispute. The territory of the sub-district is about four and one-half miles square; some of the children live two and one-half miles from the school house as at present located; that a new school house, which is about being built, will be of sufficient capacity to accommodate all the pupils of the district; that

to accommodate all those of the sub-district residing at an inconvenient distance from the school house, arrangements would be made for their instruction in nearer schools belonging to Washington school district. On these facts under the Act of 1854, petitioners would have had no case. The court below would not have passed on the judgment of the directors. As said by our Brother WILLIAMS, in *Nicklas' Petition*, 148 Pa. 212, "If they furnish accommodations for all who apply, they have performed the duty which the Act of 1854 imposes. In the performance of this statutory duty, the school directors must decide, in the exercise of their discretion, when a new school becomes necessary and where it should be located." Under that act the number of children of school age in a district did not determine the extent of the accommodations to be provided. Attendance was purely voluntary; now it is compulsory. And although the Act of 1893 was adopted at the session preceding the passage of the compulsory education bill, yet the latter had been pressed for passage for several sessions and that it would soon become a law was highly probable. It may be fairly presumed, this act was passed in view of the future necessity then imminent.

We are of the opinion the intent of the Act of 1893 is to confer on the Courts of Common Pleas of this State a power by this new proceeding to ascertain the facts and determine whether the directors have exercised a sound discretion in providing suitable building accommodations for all the school children of the district.

It is argued, that the inspector's finding of fact is conclusive on the court below; that it had no power to set it aside. From this we wholly dissent. The inspector's finding that the neglect was willful, without valid cause, and without justifiable excuse, were all inferences from the facts as reported by him. The whole case, on report being made was in possession of the court, which could draw an opposite inference if it believed such inference was warranted. Having dissented from the conclusions of the inspector, and being in a peculiarly favorable position to judge as to the correctness of the inspector's conclusions, and whether there was valid cause or justifiable excuse, it would be a rare case indeed, in which we, sitting as an appellate court, would undertake to correct the Common Pleas Court's decree on the facts. We certainly would not do so, unless the disregard of duty had been as willful as under the Act of 1854 it was required to be, before we would review the exercise of discretion by the school board. We have not passed on the question as to whether under Act of 1893 any power of re-

view of the decree of the Common Pleas is given to this court; at best such power is doubtful, unless in case of manifest abuse of discretion by the Common Pleas.

The decree of the court below is affirmed.

[See next case.]

APPEAL OF SCHOOL DIRECTORS OF KITTANNING TOWNSHIP.

Notice to school directors, by petitioners, of the time and place of hearing a petition for the appointment of an inspector, under the Act of June 6, 1893, P. L. 330, to investigate the neglect of the directors to furnish suitable school buildings, not being required by the act, is not necessary. It is enough that the inspector give the prescribed notice of the investigation. Under Act June 6, 1893, P. L. 330, provides for the appointment of a "competent inspector" to investigate the neglect of school directors to furnish suitable school buildings, a lawyer may be appointed.

Appeal of the School Directors of Kittanning Township from the decree of the Court of Common Pleas of Armstrong county, removing them from office.

Twelve citizens of Kittanning, who lived near the farm of Marlin F. Stitt, and desired a new school house to be built nearer to their dwelling-houses, presented a petition to the Court of Common Pleas, under the Act of June 6, 1893, P. L. 330, asking the court for the appointment of an inspector. Without any notice or preliminary rule upon the school directors the court appointed Austin Clark, Esq., an inspector who visited the school house and took testimony, and reported that the school directors had failed to provide suitable and adequate accommodations and suggested that a school house be erected on the public road near the house of M. F. Stitt. When the report of the inspector came into court a citation was issued to the school directors to show cause why they should not provide suitable accommodations or be dismissed from office. The directors replied that they had made all the repairs complained of and that in the judgment and discretion of all the directors it was unnecessary to build an additional school house, and further suggested that the Act of 1893 was unconstitutional, that they were using their best judgment and discretion and that their unanimous opinion was that an additional school house was not needed.

The court, RAYBURN, P. J., found that since the passage of the Act of June 6, 1893, the number of school houses, their location, etc., was no longer a question of discretion for the school board, but a question of fact to be determined by the inspector, and on the failure of the school board to build an additional school house, dis-

missed the respondents from their office and appointed other school directors in their place.

The dismissed directors took this appeal and assigned as error, *inter alia*, that the court appointed the inspector without notice to respondents (first assignment); that the court made a decree that the respondents build a new school house or be removed from office (second assignment); that the court made a decree removing the respondents (third assignment); that the court did not declare the Act of 1893 unconstitutional (tenth assignment.)

For appellant, W. D. Patton.

Contra, James H. McCain and W. J. Christy.

Opinion by DEAN, J. Filed January 4, 1897.

So far as a construction of the Act of June, 1893, is involved in this case, we have fully expressed our opinion in *Ross' Appeal* from decree of Court of Common Pleas of Greene county, decision handed down this day. It might well have been argued in the case before us, under the facts, that even under the Act of 1854 the directors were removable by the Court of Quarter Sessions for willful neglect, and consequently certainly removable under the first section of the Act of 1893.

The inspector found these facts: The school house is small and in such a dilapidated condition as to be unsafe; that twenty-seven school children live from two to two and a half miles from the school house, and that the surface of the country is such, high hills intervening between them and the school house, that it is practically inaccessible during the greater part of the school term. Deducting these twenty-seven, there are nineteen children living within reasonable distance of the school, and these are all the room will hold, it being very small. The board have frequently been importuned to provide suitable accommodations for these children, but have refused. No valid cause for the neglect is shown. The school tax levied is only five mills on the assessed valuation of the district, raising about \$1500. To this is added the State appropriation of the same amount. The amount raised by the district is less than one-fifth of that authorized by law for school and building purposes, so that there can be no pretense of financial inability. However clear may have been the purpose of the State to add to the efficiency of the school system by large appropriations made from State funds raised by taxation of corporation, license fees, and such objects, the purpose has obviously failed in this district; it has resulted only in decreasing local taxation. The court found these twenty-seven children had practically no school accommoda-

tions, and that for neglect to supply them, the directors had offered no valid excuse. As we said in *Ross' Appeal*, already noticed, that while the Common Pleas has power under the Act of 1893, to review in the method pointed out in that act, the exercise of discretion by the school board, it does not follow that we will of course review the discretion of the Common Pleas. It will be a rare case where the court below has such superior opportunities for wise action as in these cases, that a purely appellate court would undertake to review its decree on the facts or the inferences therefrom, even conceding our power to do so. As to the neglect by petitioners to give notice to respondents of the time and place of their application for appointment of inspector, the act does not require such notice, therefore respondents have no right to demand it. They had notice of the investigation, appeared, and were fully heard by the inspector. That is all the law requires.

The complaint by appellant that a lawyer was appointed inspector is no ground for reversal. A "competent inspector" are the words of the law. If a lawyer have reasonably good eyesight and acute perception, a knowledge of the law will not disqualify him as a reporter of facts. If he inject into his report law, if good law, it will not be fatal to the report; if not sound, the court can reject it. The court, after decree, indulgently gave respondents ample time to at least attempt to perform a plain duty. They stubbornly refused. They have no ground of complaint.

The assignments of error are destitute of merit. The decree is affirmed, and the appeal dismissed.

[See preceding case.]

Orphans' Court.

In re Estate of JOHN KALBFELL, Deceased.

- (1.) Where an executor under advice of counsel procures and files an appraisement of his testator's interest in a firm and assists the surviving partner, who is irresponsible, in the continuance of the business, the appraisement is the measure of liability.
- (2.) Rehearing will be allowed where petitioner can show an equity.

(For statement of facts see 43 PITTSBURGH LEGAL JOURNAL, 394.)

Opinion by HAWKINS, P. J. Filed February 18, 1897.

(1.) Every departure from the course of administration prescribed by law is at the risk of the executor; and acquiescence in, or repudia-

tion of, his devastavit is at the election of creditors and legatees: *Noble's Estate*, 178 Pa. 486. Devastavit may exist, not only where there has been direct abuse of official power, as by spending, or consuming, or converting to executor's own use, the effects of the deceased; but also by such acts of negligence or wrong administration, as will disappoint the just expectations of creditors and legatees: 3 Wm. Ex'rs, 322; *Callaghan v. Hall*, 1 S. & R. 241; *Lothrop v. Whightman*, 41 Pa. 297. Thus, where there has been loss resulting from negligent delay in making sale; or in bringing action for the recovery of assets; or by payment of an inferior to the prejudice of a superior creditor; or to a legatee where the estate is insolvent; or by embarking the effects in trade, his personal liability will follow. The principle applies with equal reason and force to permissive waste, as by the retention of perishable goods, or the employment of known irresponsible agents. So, on the grounds of public policy, where the executor buys at his own sale, or deposits trust funds in his own name, or sells to his fellows. So where, as here, an executor assents to a continuance of business by a surviving partner, who is known to be irresponsible. The disadvantage to creditors or legatees in such case is obvious. *Prima facie* the inventory filed by this executor afforded the measure of value of decedent's interest in the firm of which he had been a member. It was not necessary; but was voluntarily made under service of counsel. The natural effect was to disarm the vigilance of the creditors and legatees for whose information it was filed. While this asset remained unconverted they had ready means of verification of its value; but the method of conversion adopted, to which the executor was a party, and which was in total disregard of that prescribed by law, not only placed the evidence of its result in the hands of a debtor whose interest was to withhold it, but deprived creditors and legatees of the security to which they were entitled. It is not an answer to this, to point to the receiver's sale as evidence of an equivalent of, if not of identity with, the assets which were on hand at Kalbfell's death; for in the continuance of the business thousands of dollars may have been realized out of these assets, and new goods bought, of whose disposition the surviving partner alone can tell, and his credibility is certainly not the equivalent of evidence which the course prescribed by law would have furnished. Even if on his testimony, a balance in favor of the estate should result, it could avail these creditors and legatees nothing; for he was, and is, admittedly insolvent. It is obvi-

ously unfair that creditors and legatees should be forced into such disadvantageous position through the default of their trustee.

The exceptants insist that the continuance of the business was necessary to the advantageous closing out of the firm assets. But can the continuance of any business be trusted advantageously in the hands of an irresponsible party? The absurdity of the question is its own answer. Far better bear the ills which belong to ordinary administration, than fly to the hazards and uncertainty of such a course. The authority of the surviving partner was neither necessary nor safe. The facts which made the appointment of a receiver appropriate—nay essential—in October were no stronger than those which were known to the executor when his father died, four months before. The responsibility was his to take action. Had he taken it, which he was bound in common prudence to do, the business could have been continued safely under the direction of court in accordance with the course prescribed by law.

It is no doubt true as claimed by exceptants that appraisement before settlement of a deceased partner's interest is irregular; but where, as here, an executor procures to be made, and files, such appraisement, it becomes a record whose character as evidence he is estopped from denying. It is his official duty to obtain a settlement, and when made, to file an inventory showing its result; and it would be strange indeed if after having been guilty of gross negligence in the disposition of the assets appraised, he can repudiate the measure of value which he has himself thus furnished. No case has been found in which this precise point was involved; but in *De Haven's Appeal*, 34 PITTSBURGH LEGAL JOURNAL, 211, the validity of a surcharge which was based on such appraisement was recognized. There is in truth no reason why when filed it should not imply, like any other record, that it was rightly made, especially where as here made under the advice of counsel; and like any other appraisement, import verity, and be treated as *prima facie* evidence of value as between the parties. Where, as appeared in *Shipe's Appeal*, 114 Pa. 205, cited for exceptant, such appraisement has been shown to be the result of a mistake unaccompanied by any act of negligence on the part of the administrator prejudicial to his *oestus que trustent*, he is entitled as of course to credit; but the existence of devastavit differentiates the present case. The making of the appraisement, followed by active participation in the continuance of the business, and the postponement of legal proceedings until after his connection with

the surviving partner had been severed, was consistent only with the theory of intended conversion by the executor to his own use. He who comes into a court of equity asking relief on the grounds of mistake, must come with clean hands.

It is apparent therefore that the creditors and legatees, having thus been deprived by the executor's conduct of the means of verification and security in that direction, must fall back upon the inventory as the measure of value. When executors will pursue a policy so foreign to the duties of their office as shown in this case, they ought not complain if they should be held to the value which appraisers, chosen by themselves, have set on the assets. If they suffer by over appraisement, it is the consequence of their own indiscretion and not from any fault of their *cestuis que trustent*: *Woods' Estate*, 1 Ashm. 314, *per* President KING.

(2.) The presentation at this audit of the claim for counsel fees having been premature, it was accordingly recognized when renewed at the subsequent audit of the account filed by the administrator *c. t. a.*, but was withdrawn before adjudication.

(3.) The petition for rehearing in this case was refused for want of equity. The absence of jurisdiction in this court to settle firm affairs obviously could not exclude proof as to the rationale of the inventory or the identity of the goods which passed into the receiver's hands, with those which the surviving partner received on Kalbfell's death. The distinction was so plain that there was no possible excuse for misapprehension on the part of counsel. That they were not in truth misled by the court's ruling, is apparent from the fact that a witness, whose testimony was deemed insufficient to overcome the *prima facie* character of the inventory, was afterwards examined in reference to the manner of making the appraisement. The obvious course of calling the appraisers for the purpose of making an explanation was not even suggested. The petitioner had a full opportunity to be heard, and has had the advice and been represented by counsel throughout.

The inconsistency of some of the allegations contained in the petition with the positive testimony of petitioner at the audit discredits his application. Thus, while he there admitted that he had been employed as a clerk by the surviving partner, he now swears that the business was not continued with his "active approval, or any approval whatever." So whereas he then stated that while he was acting as clerk, sales amounting to "\$500 or so" per week had been made, now the allegation is that the stock

on hand at Kalbfell's death remained substantially the same. So his former allegation that he had instituted no proceedings against the surviving partner until the appointment of the receiver, is now denied.

On the other hand, the grant of a rehearing would have been unduly burthensome to the adverse parties who had already been twice compelled by the executor's irregular conduct to resort to expensive and annoying litigation.

In view of all the circumstances it was not apparent that justice would be promoted by a rehearing; and subsequent reflection has not changed this conclusion. While each litigant is entitled to his day in court, he cannot have more without taking what belongs to those who have equal right. Public policy requires that there shall be an end to strife.

For accountant, A. H. Rowand, Jr., and James Fitzsimmons.

For legatees and creditors, Alex. Giffman and R. B. Scandrett.

BOOK NOTICE.

THE LAW OF EVIDENCE IN CIVIL CASES by BURE W. JONES. Published by the BANCROFT-WHITNEY COMPANY of San Francisco.

Mr. Jones, the author of this work, is a member of the Wisconsin Bar and Lecturer on the Law of Evidence and other subjects in the Law School of the University of Wisconsin.

A careful perusal of the work shows that the author has succeeded very well in his object, as stated in the opening paragraph of the preface: "In the preparation of this work my primary object has been to furnish a convenient textbook for trial lawyers, stating tersely the rules of law which govern in the trial of civil cases."

Evidence is a very voluminous subject and the cases found in the reports are almost innumerable. In the present work the author has aimed at conciseness. The principles of law are stated briefly, but without leaving out essentials, and the cases are cited very fully in copious notes. The author believing that the best discussions of many difficult questions are to be found in the current legal periodicals has also cited these references.

The work comprises three volumes of the smaller size of about 700 pages each. The work has been well arranged, and lawyers will find a ready reference to the questions they want.

—An ordinance prohibiting association with thieves, etc., with intent to agree to commit any offense or to cheat any person is held, in *Ex parte Smith* (Mo.) 38 L. R. A. 606, to be an unconstitutional invasion of the right of personal liberty.

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PITTSBURGH, PA., MARCH 10, 1897.

Supreme Court, Penn'a.

HENDERSON v. ALLEGHENY HEATING CO.

In an action to recover for personal injuries caused by the explosion of natural gas which was conducted through the city streets in pipes by the defendant company, the evidence introduced by the plaintiff was to the effect that one of the defendant's pipes for conducting gas was laid within a short distance of the cellar in which the plaintiff was injured, though it was not connected with the premises; that gas escaped through a hole in the pipe caused by rust and found its way into the cellar through a newly laid sewer which it reached by passing through the loose soil between the pipe and the sewer; that for two weeks prior to the accident escaping gas had been detected in the vicinity and the defendant notified thereof, though nothing was done to stop it. All this testimony was contradicted by the defendant. Held not error to enforce binding instructions in favor of the defendant.

Appeal of the Allegheny Heating Company, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of trespass brought by William G. Henderson.

This was an action brought by William G. Henderson, who, on February 27, 1895, was employed in the tobacco factory of Ralph H. Logan in Ohio street, Allegheny City, to recover for injuries received by him through an explosion occurring in the factory on that date, alleged by him to have been caused by gas negligently allowed by defendants to escape from its pipes into the factory. The other essential facts, as they appeared on the trial before McCUNG, J., are stated in the opinion of the Supreme Court, *infra*.

The defendant asked, *inter alia*, for binding instructions to the jury to find in his favor, which were refused. Verdict and judgment for plaintiff. The defendants took this appeal.

For appellant, *William M. Hall, Jr.*
Contra, Young & Trent.

Opinion by STERRETT, C. J. Filed January 4, 1897.

The question presented by the single specification of error in this case is whether the testimony relating to the defendant company's negligence, and the alleged contributory negli-

gence of the plaintiff himself, was of such a character as to justify its submission to the jury. The learned trial judge, being of opinion that it was, refused the defendant's request for binding instructions and submitted both questions to the jury in a very elaborate charge to which no exception was taken. In defending his action in thus ruling a detailed review of the testimony is wholly unnecessary. A brief reference to the salient facts, and the character of the evidence, will be quite sufficient for the purpose.

The explosion which caused plaintiff's injury occurred February, 1895, in a tobacco and cigar manufactory on Ohio street, Allegheny City. The building was not supplied with either natural or artificial gas, or with pipes for conducting the same. The company defendant had two lines of pipe laid in the street in front of the building, one of which was an eight-inch pipe used for the general distribution of gas in that neighborhood, and the other a three-inch pipe used in supplying gas to premises quite near the exploded building. This pipe passed within a few feet of the cellar wall of said building. Some months prior to the accident a sewer pipe was laid from the rear of the building, through the seller and out beneath the smaller gas pipe, and thence into the main sewer in Ohio street. The soil in the neighborhood was composed largely of sand and gravel.

Plaintiff's theory of the explosion was that gas had been escaping from a break in the smaller pipe for some time, and passed through the loose soil until it reached the recently laid sewer pipe, and thence followed the same into the cellar where it had been accumulating until the explosion occurred. In support of this theory, part of the evidence was to the effect that escaping gas had been detected at that point for a couple of weeks prior thereto. The explosion occurred immediately after the trapdoor leading to the cellar was opened; and soon thereafter, when the gas pipe immediately in front of the premises, was uncovered, an old rusty break therein was discovered. It was also testified, on behalf of the plaintiff, that more than two weeks before the accident defendant company was notified of the presence of escaping gas in the neighborhood, but nothing was done in response thereto. It was denied that any such notice was given; and testimony in rebuttal of plaintiff's case generally was introduced by defendant.

Without further reference to the testimony introduced by the respective parties, it is sufficient to say that it was more or less conflicting and presented questions of fact which a jury alone could legally determine. It therefore

follows that there was no error in refusing to charge "that under all the evidence in the case, there can be no recovery by the plaintiff."

Judgment affirmed.

DOUGLASS FURNACE COMPANY v. OIL WELL SUPPLY COMPANY.

The legal plaintiff assigned for value an account against the defendant to the receiver of a company, the receiver in turn assigning the claim, with the ratification of the legal plaintiff, to the present use plaintiff, who brought suit. The receiver was authorized by his appointment to complete outstanding contracts, to pay expenses in the business under his management, and to indorse and use for the purpose of the receivership the paper coming into his hands. Prior to the assignment by the receiver attachments were issued in the State of Ohio against the legal plaintiff, the receiver and the present use plaintiff, but the defendant was not served. *Held*, that the defendant could not successfully attack the title of the present use plaintiff to the account.

Appeal of the Oil Well Supply Company, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action upon a book account, wherein judgment was directed by the court in favor of the Douglass Furnace Company.

The Oil Well Supply Company, a corporation of Pennsylvania, the defendant in this case, was indebted to the Douglass Furnace Company, a corporation of Illinois, doing business in Pennsylvania. The Douglass Furnace Company became insolvent, and, being indebted to Corrigan, Ives & Co., of Cleveland, assigned its accounts, including that of the Oil Well Supply Company, to Price McKinney, who had been appointed receiver of Corrigan, Ives & Co., by a paper dated July 18, 1893. In August, 1893, two attachments were served on Price McKinney, receiver, at suits in the Common Pleas Courts of Cleveland, of creditors of the Douglass Furnace Company. The Hostetter Connellsville Coke Company, a creditor of the Douglass Furnace Company for a large amount, issued foreign attachments in Allegheny county, and attached a number of claims here due to the Douglass Furnace Company, including the debt of the Oil Well Supply Company. To release these accounts which had been assigned to him and to enable him to collect them, Price McKinney, receiver, assigned to the Hostetter Connellsville Coke Company three accounts, one of which was the Oil Well Supply Company account, by a paper dated December 5, 1893, which assignment was joined in by Corrigan, Ives & Co. and by the Douglass Furnace Company.

The Oil Well Supply Company refused to pay

the claim to the Hostetter Connellsville Coke Company, and this suit was brought in the name of the Douglass Furnace Company, for use of Price McKinney, receiver of Corrigan, Ives & Co., for use of the Hostetter Connellsville Coke Company.

Judgment was given for the plaintiff for the sum of \$10,047.09, and defendant appealed.

For appellant, *James C. Boyce*.

Contra, *Knox & Reed* and *Edwin W. Smith*.

Opinion by WILLIAMS, J. Filed January 4, 1897.

The defendant company was indebted to the legal plaintiff in the spring of 1893 for goods sold and delivered, to the extent of about \$10,000. The furnace company was indebted at the same time to Corrigan, Ives & Co., and, having become insolvent, it assigned its demand against the defendant, with its other accounts and bills receivable to Corrigan, Ives & Co., whose affairs were then in the hands of a receiver. The order of court appointing the receiver authorized him to complete the outstanding contracts of Corrigan, Ives & Co., to pay the expenses accruing in the business under his management, and to indorse and use, for the purposes of the receivership, the commercial and mining paper of the firm coming into his hands. In December, 1893, the receiver assigned the account against the Oil Well Supply Company to the use plaintiff, the Hostetter Connellsville Coke Company. This assignment was ratified by the Douglass Furnace Company, in writing, on the 5th day of December, 1893, so that the present plaintiff derives its title from the original creditor of the Oil Well Supply Company, as well as from Corrigan, Ives & Co., its assignee. The only defense set up does not go to the debt sued for, but to the title of the use plaintiff. The allegation is that attachments have been issued in the state of Ohio against the Douglass Furnace Company, with notice to the assignee of Corrigan, Ives & Co., as garnishee, which are binding in that State upon the assignee. As these attachments have not been served on the Oil Well Supply Company, they are not affected by them. Whether Price McKinney has incurred responsibility to these attaching creditors by the assignment of this demand against the Oil Well Supply Company to the use plaintiff, after the service of the attachment upon him, is a question which he must settle with the court which has jurisdiction over his accounts. It cannot be raised by the defendant. As to it, and as to everybody, unless it may, possibly, be the attaching creditors, both the Douglass Furnace Company and Corrigan, Ives & Co. have

invested the present plaintiff with their interest in and title to the debt in suit, and payment of this judgment will relieve the defendant from further liability for the demand upon which it is founded. Whether McKinney shall be surcharged by the Ohio courts because of his having made the assignment to the coke company is not for us to consider. Our question is whether the plaintiff shows a right to recover upon the facts as they are presented on this record. The assignments of error are overruled, and

The judgment is affirmed.

BRYMER v. THE BUTLER WATER CO.

Under Act April 29, 1874, giving the Courts of Common Pleas visitatorial powers as to water companies, and providing that any customer of such companies may complain by petition of the charges for water furnished, and authorizing the court to determine the reasonableness of the charges complained of, and decree that the charges be decreased, the courts have not jurisdiction, in the first instance, to prepare a general tariff of water rates, and require companies to furnish water at such rates.

A system of water rates that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for payment of debts, and pay a fair profit to the stockholders on their investment, is not unreasonable.

In determining the investment of stockholders, stock issued in place of profits earned, which were used for improvements, is to be considered.

Appeal of the Butler Water Company from a decree of the Court of Common Pleas of Butler county, establishing a schedule of prices to be charged by said company, entered in a proceeding by Andrew Brymer *et al.* against said company.

In this case the Court of Common Pleas made a decree suspending the collection of water rents by the Butler Water Company, so long as the water furnished by it was unfit for domestic use. This decree was affirmed by the Supreme Court, see 43 PITTSBURGH LEGAL JOURNAL, 247; 172 Pa. 489. The Butler Water Company presented a petition setting forth that it had obtained a new supply of water at a large expense and praying the court to make a further decree that a pure and sufficient supply of water was being furnished and to fix the time when such supply was first furnished and to fix the rates to be charged therefor, and to that end a prayer was added that the case should be reheard upon the question of rates, and that the court would hear further testimony as to all matters alleged since the testimony was formerly closed. The water company also submitted a schedule of rates which it proposed to charge for their water.

At the hearing, before GREER, P. J., the water

company presented, *inter alia*, the following requests for findings of law:

3. "If the water furnished by the defendant company is adequate and reasonably pure, the power of the court ends (if any such power it has), with fixing the rates of water as it is furnished. The water company may for itself select the source of supply, and determine the system of collection and distribution, the mode of storage, and control generally the business details. And the rates must be determined with reference to the expenditures of the company made or being made in obtaining the supply."

4. "The Butler Water Company is a corporation for profit and, as such, is entitled to charge such rates for water as will pay expenses, accumulate a sufficient fund to maintain the plant in good condition and pay a reasonable profit upon the money expended. As long as the rates charged, or proposed to be charged, do not exceed this they are not extortionate or unjust, and are not within the control of the court."

The court made the following decree:

"And now, September 11, 1896, this cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

"I. The quality of the water now being furnished by the defendant company to its patrons, the plaintiffs in this case, is sufficient and is ordinarily pure and fit for use.

"II. The order heretofore made on September 14, 1895, in this case, that 'from February 1, 1895, until pure (reasonably pure) water in sufficient quantity is furnished by the Butler Water Company to its patrons, no rates or charges shall be made or collected from consumers,' except for certain purposes therein stated, is hereby rescinded and the defendant company is permitted and allowed from March 1, 1891, and hereafter, to charge the plaintiffs at the rates hereinafter fixed by the court.

"III. The water rates of the defendant company from March 1, 1896, to be charged and collected from the plaintiffs for water furnished by the defendant company to the plaintiffs shall be as follows, viz.:

FOR EACH YEAR, DOMESTIC RATES:

A minimum rate of \$4 will be charged for each family in dwellings. Additional charge for each furnished room, above one, without spigot therein.....	\$1 00
For each slop sink using hot or cold water or both—Self-closing spigot.....	3 00
Common spigot.....	3 50
Bath tub—Self-closing spigot.....	2 50
Common spigot.....	3 00
etc., etc.	

"IV. The costs in the case, including a fee of \$35 to John Findley, accountant, shall be paid by the defendant company."

The water company took this appeal and assigned as error, *inter alia*, the refusal of its fourth request for findings of law; the decree that the charges should be fixed by the court; making any decree fixing rates; the imposition of costs upon the company.

For appellant, *T. C. Campbell, Charles H. McKee and John M. Thompson.*

Contra, Andrew G. Williams, Clarence Walker, W. A. Forquer, S. F. Bowser and R. P. Scott.

Opinion by WILLIAMS, J. Filed January 4, 1897.

The questions presented on this appeal are unlike those that were considered and decided in 172 Pa. 489, when these parties were first before us. The questions then raised related to the power of the court to suspend the collection of water rent by the company so long as the water delivered by it to its customers was so impure as to be clearly unfit for domestic use. We held, affirming thereby the ruling of the court below, that the Act of April 29, 1874, invested the Courts of Common Pleas with the visitatorial powers of the Commonwealth as to water and gas companies so far as related to the quality and quantity of the supply furnished and the prices charged therefor. This supervisory power was brought into exercise upon the petition of one or more consumers making complaint against the company on account of deficiency in the quantity or quality of the water furnished, or of the excessive and unreasonable charges made therefor. Upon a hearing of the testimony the statute empowered the court to dismiss the petition, or to make such order for the relief of the petitioners as the facts disclosed by the evidence might require. This we held included the power to enjoin the company against the collection of water rents when the water furnished was clearly unfit for domestic use.

But we also held that this statute gave the court no power to operate the plant of the water company or to interfere with or direct the official discretion of its officers otherwise than as therein prescribed. Where it should go for its source of supply, by what route the supply should be brought to its distributing reservoir, and by what system of distribution it should be taken to its customers, together with all similar questions of construction and operation, were within the exclusive control of the company. It might determine to suspend its operations or to continue them; to increase its capital or to

withdraw it altogether; but so long as it continued in the exercise of its franchises it was subject to the supervisory control of the court for the protection of the public supplied by it. The court was charged to inquire first, whether the corporation was discharging the duty it had assumed and was supplying water to its customers suitable in quality, and sufficient in quantity. It was also to inquire upon complaint made whether the company was extorting from its customers an unreasonable price for the water furnished.

While the litigation in which this decision was reached was in progress, the water company had been earnestly at work, endeavoring to relieve itself from its embarrassment. It had gone up the Connoquenessing creek several miles to a point above the oil and gas wells which had poured salt water into the stream, constructed a large impounding reservoir, extended their supply pipes up to it, and thus obtained a supply of water reasonably pure, and ample in quantity, to supply the town of Butler. When this had been accomplished, the water company presented in the court below its petition setting forth the facts and asking that their truth be inquired into, and if satisfied, that the court would so determine by an appropriate decree, and permit the company to collect water rents from its customers in accordance with a schedule which it had prepared and presented to the court. The learned judge directed an investigation. From the evidence produced on the hearing he found the facts to be as alleged by the water company, and that the company was now entitled to charge and collect water rents, but he declined to approve the schedule of water rents presented. On the other hand he prepared another schedule made up in part from evidence received upon the hearing, and in part from information gathered through other channels regarding the prices charged in other cities and towns. This schedule he incorporated into the decree and the company was authorized thereby to charge water rents in accordance with the rates so fixed and not otherwise.

This appeal is from so much of the decree as imposes the schedule of charges prepared by the learned judge, upon the water company, and forbids the charging and collection of any other rates than those so prescribed. The water company alleges that the court has no power to adopt a tariff of prices for it; but that if this proposition should be denied still the tariff of prices adopted by the court is erroneous because constructed upon a mistaken basis. It will thus be seen that the real question at issue is whether the boundary line that separates the discretion-

any control of the owner from the supervising control of the courts, which was pointed out in 172 Pa. 489, terminates when the plant is completed and a suitable water supply procured, or continues on through the business operations of the corporation? The answer to this question must depend on the nature and extent of the powers that result from the mere fact of ownership, and on the character of the restrictions, if any, which the Commonwealth may have put upon those powers in the interest of the public.

The ownership of a corporation is as absolute and comprehensive as that of a private citizen. It includes the right to put a value upon its property, and to determine on what terms it will part with it, or supply its customers with the commodity in which it deals, in the same manner that an individual or a partnership could do. But as the corporation derives its existence and its powers and franchises from the State, it is more directly accountable to the State than a natural person now is, under existing laws, for the exercise of good faith in the conduct of its business and for the reasonableness of its charges. The State intervenes for the protection of the citizen. When therefore a customer of a water company finds the company neglecting or refusing to furnish him with an adequate supply of water, or finds the water furnished to be unfit for domestic use, he is authorized by the Act of 1874 to make his complaint to the Court of Common Pleas of the proper county by petition. The court is thereupon required to investigate the subject and "to dismiss the complaint, or compel the corporation to correct the evil complained of" as the evidence may require. As one of the proper methods for the enforcement of a decree against the company, we held in *Brymer v. The Water Company*, 172 Pa. 489, that the company might be restrained from the collection of water rents until the decree was complied with. But the same statute provides that any customer of the company may complain by petition of the charges made for water furnished, and requires the court to hear and determine as to the charges complained of, and "to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court shall seem just and equitable."

A provision in the third section of the Act of June 2, 1887, relating to the jurisdiction of the courts over gas and water companies, is supplemental to the Act of 1874, and defines somewhat more distinctly the duty of such companies to furnish the public with pure gas and water, but it contains no allusion to the subject of price. The power of the court to interfere between the

seller and the buyer of water is conferred only by the provisions already quoted from the Act of 1874; and that act authorizes the court to entertain the complaint of the buyer, to investigate the reasonableness of the price charged, and to "dismiss the complaint" or to order that the charges complained of, if found to be unreasonable and unjust, shall be decreased. The water company prepares its schedule of prices in the first instance and makes its own terms with its customers; but if these are oppressive so that in the exercise of the visitatorial power of the State, the just protection of the citizen requires that they be reduced, then the court is authorized to say: "This charge is oppressive. You must decrease it. You are entitled to charge a price that will yield a fair compensation to you, but you must not be extortionate." This is not an authority to manage the affairs of the company, but to restrain illegal and oppressive conduct on its part in its dealings with the public. It may be that the power to order any particular item of charge shall "be decreased" includes the power to fix the extent of the reduction to be made, or to name the maximum charge for the particular service in controversy, which the court will approve, but the decree is that the item shall "be decreased" either generally or to a sum named. The schedule of charges must be revised accordingly by the company defendant and such revision may be compelled in the same manner that the decree of the same court may be enforced in other cases.

We do not think this supervisory power would justify the court in preparing a tariff of water rents and demanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property and the business of a solvent corporation from its owners to a court of equity, for no other reason than that the court regarded some one or more of the charges made by the company as too high. The Act of 1874 contemplates no such radical departure from established rules as this, but provides simply for the protection of the citizen from extortionate charges specifically pointed out and complained of by petition.

This leads us to the second question raised, viz., by what rule is the court to determine what is reasonable, and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will

earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. In determining the amount of the investment by the stockholders, it can make no difference that money earned by the corporation and in a position to be distributed by a dividend among its stockholders was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is not necessary that the money should first be paid to the stockholder and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder. If the company makes an increase of stock that is fictitious and represents no value added to the property of the corporation, such stock is rather in the nature of additional income, than of additional investment. The whole subject was brought to the attention of the learned judge by a request that he should find as matter of law that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying in reply to the request: "We have no authority for such a ruling, and it would be unjust to the consumer who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment and have no voice in the management of the business of the company. The Act of Assembly in this regard can bear no such construction." This ruling cannot be sustained. The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just. Some towns are so situated as to make the procurement of an ample supply of water comparatively inexpensive. Some are so situated as to make the work both difficult and expensive. What would be an extortionate charge in the first case might be

the very least at which the water could be afforded in the other. The law was correctly stated in the defendant's request and the court was in error in refusing it. But we think the court had no power to adopt for, and enjoin upon, the company a comprehensive schedule like that incorporated into the decree in this case. The decree found that the water supply furnished by the defendant company was abundant and "reasonably pure and fit for public use," but without any adjudication that any particular charge or charges complained of were excessive and must be decreased, he made a decree that "the water rents of the defendant company from March 1, 1896, to be charged and collected from the plaintiffs for water by the defendant company to the plaintiffs, shall be as follows." Then follows a table filling two and a half pages of the appellant's paper-book, and providing specifically for domestic rates, for livery, hotel and trading stables, for hotels and boarding houses, for fountains, steam engines, schools, motors, public buildings, special rates, and meter rates, subject to the provision that "when the water," which the same decree had just pronounced to be reasonably pure and suitable for domestic use, "is properly filtered such charges may be increased twenty per cent." The school district of Butler was not a party complainant in this case, nor was the county of Butler, but both were taken under the protection of the court and specifically provided for by the decree. Fountains are luxuries. The question whether the police power of the State can be successfully invoked to cheapen the price of water furnished for purposes of display or the mere gratification of one's taste is at least open to discussion, but without discussion it is disposed of by this decree, and the price reduced. In short upon a general complaint that the rates charged by the defendant were too high, without specification of the particular charges that were alleged to be excessive, the court has undertaken to revise the entire schedule of prices, and instead of directing the company to decrease the objectionable charges has formulated an entirely new schedule of prices covering all of the business of the company. This new schedule it has framed upon the mistaken basis adopted and stated in the third conclusion of law already considered. This action is not authorized by the Act of 1874. It is not the hearing of a complaint against the charges made by the company and a decision of the controversy so arising, but it is the assumption of a power to frame a schedule of prices covering the entire business of the company, with all its customers, many of whom are not even complaining of the rates paid by

them. The framing of such a general schedule is ordinarily the right of the company. The correction of this schedule when framed, whenever it may work injustice and hardship, is the prerogative of the court, and one which should be fearlessly exercised.

For the reasons now given this decree cannot be affirmed, but under the peculiar circumstances surrounding this case we cannot enter a simple decree of reversal.

The first paragraph of the decree appealed from is affirmed. The second paragraph is affirmed so far as it operates to rescind the decree of September 14, 1895. The third paragraph is reversed. The reversal to take effect on the first day of March, 1897. In the meantime the rates established by it shall continue. Before the first of March, 1897, the company may prepare a just and reasonable schedule of charges to go into operation on the said first day of March. If any of such charges shall be complained of thereafter the customer complaining may proceed under the Act of 1874 to a hearing, and the court may dismiss the petition or order the charges to be decreased to such extent as may seem to the said court equitable and just. In view of the history of this case the fourth paragraph of the decree appealed from is affirmed.

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

YOUNG et al. v. LYNCH.

The husband cannot be tenant by the curtesy of the wife's estate in remainder unless the particular estate be ended during coverture.

The saving clause of the first section of the Intestate Act of April 8, 1833, viz.: "Saving to the husband his right as tenant by the curtesy, which shall take place, although there be no issue of the marriage, in all cases where the issue, if any, would have inherited," removes the necessity of the birth of issue, but nothing more.

No. 956 July T., 1895. Motion for a new trial.

Opinion by NATHANIEL EWING, P. J., of the 14th District, specially presiding. Filed February 16, 1897.

This is an action of ejectment for a lot of ground situate on the west side of Arch street (formerly Beaver avenue) in the Second ward of the city of Allegheny. Both parties claim under Samuel Young, who died in 1871, and by will (peculiarly drawn, but which in effect and by proper interpretation it is practically conceded) devised the disputed premises to his widow, Mary Ann Young, for life, with remain-

der in fee to his daughter, Henrietta Lynch, wife of the defendant.

Henrietta Lynch died in September, 1893, intestate and without issue, leaving to survive her seven brothers and sisters, the plaintiffs in this action, her husband, the defendant, and her mother, and never having had possession or right of possession of the disputed premises.

Mary Ann Young, the widow and life tenant, and mother of the plaintiffs and Henrietta Lynch, deceased, held this property from her husband's death until her own death in December, 1894. After the death of Mary Ann Young the defendant obtained possession, and seeks to retain it as tenant by the curtesy as surviving husband of Henrietta Lynch, deceased. The plaintiffs claim the title and possession under the intestate laws.

The real and only question involved is, whether the defendant is entitled to any tenancy by the curtesy, in view of the fact that his wife never had any possession of the property, her estate and interest therein being a remainder in fee, and her mother's life estate not having terminated until after her own death.

The defendant, while admitting that seisin was requisite prior to the intestate Act of April 8, 1833, contends that seisin, as well as the birth of issue, is abolished as a requirement by the saving clause in the first section of that act. Said clause is as follows, viz.: "Saving to the husband his right as tenant by the curtesy, which shall take place, although there be no issue of the marriage, in all cases where the issue, if any, would have inherited."

The plaintiffs reply that the only object and effect of said clause is to avoid the requirement of birth of issue, nothing more.

Although the question does not appear to have ever heretofore been raised in just this form, yet the expressions of the courts in similar cases have uniformly been in accord with the plaintiffs' position, and such has undoubtedly always been the understanding of the profession. In the following cases said clause is expressly stated to "dispense with the birth of issue as a constituent of curtesy," without in any way intimating that the necessity of seisin has been thereby disturbed; *Lancaster County Bank v. Stauffer*, 10 Pa. 398; *Clarke's Appeal*, 79 Id. 376; *McMasters v. Negley*, 152 Id. 303. See also *Williams on Real Property* (6th Ed.), 228, n.; *Scott on the Intestate Law* (2d Ed.), 507; *Am. & Eng. Ency. of Law*, Vol. 4, 961, note 2.

To warrant the construction contended for by the defendant something must be read into the act which the Legislature did not insert, but which could have been readily added had there

been any intention to affect the question of possession. Thus, it would have been easy to have said, "Saving to the husband his right as tenant by the curtesy, which shall take place, although there be no issue of the marriage, in all cases" of an estate of inheritance, in possession, reversion or remainder, in the wife, which "the issue, if any, would have inherited." But it was not the character of the wife's estate which was in contemplation, but solely the question of issue. And in such cases as those where the issue would not inherit no change in the common law rule is effected. It is somewhat difficult to perceive just how the husband's curtesy could have been preserved upon the failure of issue capable of inheriting by any more appropriate and apt language than that employed in the act.

It is singular, to say the least, that the construction now claimed by the defendant was not advanced long ago. In no single case thus far discovered has it been even hinted at.

It is said, also, that seisin now means no more than ownership anyhow; and, while it is true that the term is frequently employed in the sense of ownership, yet that is but a very general and popular, and not at all a skilled, technical or professional signification of the word. Especially is it not the common law meaning, and we are dealing with it as a common law term when we are considering it as a requisite of a curtesy estate. Curtesy is peculiarly and entirely a creature of the common law. Our intestate laws provide for it, but they do not create it, nor do they affirmatively adopt it. They simply recognize it with all its common law requirements and incidents—modified in some respects by judicial construction—except as to the birth of issue.

If ownership merely, and neither possession nor the right of possession, is all that is necessary, we then have many reported cases which were considered upon a false assumption of the law and erroneously determined. The facts relating to the estate of the curtesy in *Hitner v. Ege*, 23 Pa. 305, are practically identical with those in this case, and it is there held that "the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during coverture." The only difference between that case and this is, that there were children who took the undivided third interest (which constituted the particular life estate) under the intestate laws, while here those claiming in the same manner are (in the absence of children) the brothers and sisters of the intestate. *Pierce v. Hakes*, in the same volume, page 231, is also

a strong case in support of the actual necessity of the wife's seisin, notwithstanding the clause cited from the Act of 1833 and so relied upon. There the whole question of the tenancy by the curtesy turned upon the question of seisin, to support which a deed of surrender of the particular estate was introduced, and without which support the husband was held to have no such estate. To the same effect are *Chew v. Commissioners of Southwark*, 5 R. 159; *McKee v. Jones*, 6 Pa. 425; *Buchanan v. Duncan*, 40 Id. 82; *Williams v. Baker*, 71 Id. 476; *Com'th v. Naile*, 88 Id. 429, and *Young v. McIntyre*, 6 W. N. C. 252.

Then there are certain incidents of the estate by the curtesy, necessary and peculiar and universal, which could not pertain to it if actual, constructive or potential possession of the wife during coverture were not required. That would be to create a new estate, and to destroy tenancy by the curtesy proper. Thus, the curtesy estate must arise, begin, during the lifetime of the wife, become initiate then. What is going to initiate it? At common law three things were necessary, marriage, seisin of the wife and birth of issue capable of inheriting. We have avoided the last of these, and, the defendant would say, the second also. Then what have we left? Nothing but marriage, which never could, and, without destroying the old character of the estate altogether, never can alone create a curtesy estate. But, again, the estate must become consummate, perfected, at the instant of the wife's death. The estate by the curtesy is but a continuation of the estate or right of the wife, and without the perfected estate beginning, in the husband, immediately upon the wife's death, there could be no continuation: *Chew v. Commissioners, supra*; *McKee v. Jones, supra*; *Bank v. Stauffer, supra*; *Clarke's Appeal, supra*; *Scott on the Intestate Law, supra*, 506. Now all this is simply impossible where there is no possession of the property during coverture. We would have then, upon the defendant's contention, instead of the well-known common law estate by the curtesy, with all its recognized requisites and incidents, an entirely new estate,—a life estate in the husband, initiate upon marriage, in every possible estate of inheritance of the wife, no matter when it vests in her (since marriage is the only initiatory agent), and no matter when it may come into possession; and consummate, not upon death of the wife alone, but upon death of the wife and the termination of the particular estate or estates preceding hers; and thus a continuation of no interest or estate of the wife, but a continuation of the estate of the

tenant of the freehold. Would any one denominate that a tenancy by the curtesy? Is that not too radical a change, too complete a destruction, of the curtesy estate to be effected by a merely possible construction of an Act of Assembly, when that act is not only capable of, but suggests, the construction which it has received for over three score years, and upon which estates have been founded and the profession has rested?

It certainly does seem that if such an entirely new estate were intended to be created something more than a saving clause requiring so doubtful a construction would have been employed for the purpose; and, consequently, the direction to the jury to render a verdict for the plaintiffs is now judged to have been correct.

ORDER.

It is, therefore, this 25th day of February, 1897, for the reasons given in the foregoing opinion, hereby ordered and directed that the motion for a new trial be overruled and denied, and a new trial refused, and that judgment be entered on the verdict upon payment of the jury fee.

Per Curiam.

For plaintiffs, *R. A. & James Balph.*

For defendant, *Levi Bird Duff.*

Orphans' Court.

In re Estate of DAVID B. SUTTON, Deceased.

The purpose of the Act of 1885 was to restore uniformity of the rule that persons standing in equal degree to an intestate should take *per capita* which had been modified by the Act of 1855; it did not affect the classes of persons who were to take; therefore children of deceased nephews and nieces take, where there living nephews or nieces by representation.

Opinion by HAWKINS, P. J. Filed February 19, 1897.

(1.) The main contention in this case turns on the question whether or not the effect of the Act of 1885 was to repeal the Act of 1855 so far as it gave grand-nephews and nieces the right to take by representation?

(2.) If not, the question will arise as to the "manner" in which they shall take.

(1.) It is clear that under the Act of 1855, grand-nephews and nieces took by representation. That is the plain import of its language, and the construction which the Supreme Court has given it: *Hayes' Appeal*, 89 Pa. 256; and that must be the rule of distribution in the present estate unless the later Act of 1885 has restored the limit of representation to nephews and nieces as fixed by the Act of 1833. The

fact that the language used in the body of the first section of the Act of 1885, is a copy of the 14th section of the Act of 1833, naturally suggests the idea of return to the system established by the prior act. But an analysis will show that this is only in part true. Neither the 14th section of the Act of 1833, nor the first section of the Act of 1885 purports on its face to ascertain the persons who shall take, for that is fixed by other sections of the intestate law; but relate solely to how that particular class of lineals and collaterals standing in the same degree of consanguinity to the intestate, shall take; and by implication excluded that class which by another section of the intestate law was entitled to take in unequal degrees. The preamble to the Act of 1885 specifically declares and emphasizes this purpose thus: "An Act providing for the manner in which estates of intestates shall be distributed where the distributees stand in the same degree of consanguinity to the intestate." Why then this reenactment of the 14th section of the Act of 1833? The reason lies in the disturbance which the Act of 1855 caused in a settled policy of the State to maintain uniformity in the rules prescribing the "manner" in which distribution should be made. Prior to the passage of that act the manner of distribution amongst all those who were next of kin standing in the same degree, was *per capita*; while that among those standing in unequal degrees was *per stirpes*. In 1879 the Supreme Court held, *Hayes' Appeal*, *supra*, that the effect of the Act of 1855 was to make grand-nephews, and nieces who were next of kin standing in the same degree, an exception to the first of these rules. Hence the Act of 1885. The evident intent of that act was to harmonize the "manner" of taking by this class of distributees with the settled policy of the State—in other words to make the whole system consistent and uniform—and therefore make next of kin who were grand-nephews and nieces standing in equal degree take, not by representation, but equal shares directly from the intestate. To carry the effect of the statute further would not only go beyond the plain import of its language, but repeal by gratuitous inference a statute whose benign purpose was to remedy an admitted harshness. This cannot be. It follows that so much of the Act of 1855 as extends the limit of representation from nephews and nieces to grand-nephews and nieces, and thereby to create an additional class of distributees, remains unaffected by the Act of 1885; and that consequently the grand-nephews and nieces of this decedent are entitled to share in the distribution of his estate.

The question does not appear to have been the subject of adjudication by the Supreme Court; but able opinions by PENROSE, J., reported in *Whittaker's Estate*, 175 Pa. 141, and OVER, J., in *McConnell's Estate*, 44 PITTSBURGH LEGAL JOURNAL, 209, lead to the same conclusion.

(2.) The question as to the manner in which these distributees shall take is easy of solution. The principle is well settled that where collaterals who are entitled to take stand in unequal degrees of relationship to the intestate, those farthest removed take by representation the shares which their parents, if living, would have taken; and consequently the basis of distribution here must be the number of nephews and nieces who survived, or left issue surviving. Mr. Sutton: *Kroul's Appeal*, 60 Pa. 360.

For Mrs. Garrison, *John S. Robb* and *W. B. Rodgers*.

For great grand-nephews and nieces, *W. K. Jennings*.

For grand-nephews and nieces, *D. T. Watson*.

Circuit Court, United States,

Western District of Pennsylvania.

JANE BRYAR et al. v. JAMES BRYAR, Bankrupt,
THOMAS CAMPBELL et al.

The wife of a bankrupt brought a bill in equity in the U. S. District Court against the bankrupt and his assignee, claiming to be the equitable owner of the undivided one-half of land, the legal title to which was in the bankrupt. C., the assignee's vendee, intervened as defendant. There was a decree in favor of the wife and an appeal therefrom to the Circuit Court. Pending proceedings upon the appeal the wife brought ejectment upon her alleged equitable title against C. in a court of the State (Pa.) in which there was verdict and judgment against the wife. *Held*, that the wife and her heirs were thereby concluded in the pending suit in the Circuit Court.

It being an established rule of property in Pennsylvania that in ejectment upon an equitable title one verdict and judgment are conclusive of the title, equally binding effect is to be given thereto in the courts of the United States.

No. 30 Nov. T., 1879. In Equity.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Coram ACHESON and BUFFINGTON, JJ.

Opinion by ACHESON, Cir. J. Filed February 5, 1897.

Pending this appeal, in the year 1880, Jane Bryar brought an action of ejectment in the Court of Common Pleas No. 1, of Allegheny county, Pennsylvania, against Thomas Campbell and others, to recover the land here in controversy. That case was tried before a jury and a verdict rendered in favor of the defendants in the action. Judgment upon the verdict having

been entered, Mrs. Bryar sued out a writ of error, and, after argument, the Supreme Court of Pennsylvania affirmed the judgment of the Court of Common Pleas (30 PITTSBURGH LEGAL JOURNAL, 12.) In that ejectment Mrs. Bryar set up against Thomas Campbell, as the basis of her right to recover, the same equitable title, which was the foundation of her bill in equity in the United States District Court and which her heirs now assert against Campbell in this court. These facts—which have been brought upon the record by proofs and a written stipulation—are decisive, we think, against the heirs of Jane Bryar, the now appellees. Mrs. Bryar elected to have her rights determined in the State courts, and Campbell was compelled to defend in the State forum. Whether or not Campbell could have set up the pendency of the bill here in abatement or bar of the action in the Court of Common Pleas, we need not inquire. It is enough that he did not attempt to do so, and the action proceeded in the State courts upon the merits to final judgment. As an adverse decision there against Campbell would have concluded him, so the decision in his favor concluded Mrs. Bryar and her heirs. The ejectment brought by Mrs. Bryar was upon her equitable title—a procedure allowable in the courts of Pennsylvania, where an equitable ejectment is the full equivalent of and substitute for a bill in equity; and it is well settled that in ejectment upon an equitable title one verdict and judgment are conclusive of the title: *Peterman v. Huling*, 31 Pa. 432; *Winpenny v. Winpenny*, 92 *Id.* 440. This being an established rule of property in Pennsylvania, an equally conclusive effect is to be given to such a verdict and judgment in the courts of the United States: *Miles v. Caldwell*, 2 Wall. 36. A complete defense to this bill is therefore shown, and that defense is available here under the present pleadings supplemented by the stipulation of counsel.

BUFFINGTON, J., concurs.

DECREE.

This cause having come on for final hearing upon the proofs, pleadings and a written stipulation, was argued by counsel; and now, February 5, 1897, upon consideration the decree of the District Court is reversed—the costs in that court, however, to be paid by Thomas Campbell; and it is further ordered, adjudged and decreed that the bill of complaint be and the same is dismissed (without costs in this court.)

By the Court.

For appellants, *W. B. Rodgers*.

For appellees, *L. C. Barton*.

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No. 34.

PITTSBURGH, PA., MARCH 17, 1897.

Supreme Court, Penn'a.

THOMPSON v. SPROUL & CO.

Plaintiff purchased traction stock through the defendant, a broker, which was left in the custody of the latter. About ten months after this transaction plaintiff's son, of the same name, opened an account with the defendant in relation to sale of wheat. The account of the plaintiff and the receipt of money to him were made by the defendant with Sr. attached to his name while the account opened by the son and the receipts given him were in his name with Jr. attached. The wheat transactions of the son were unsuccessful and defendant sold out the plaintiff's stock to make them good. Plaintiff and his son both testified that their accounts were separate and that both were opened with the money of each respectively, while the defendant contended that both transactions were for the benefit of the son. *Held* not error for the court to refuse the point that under all the evidence the verdict must be for the defendant.

In such a case, mere authority from the father to the son to purchase stock for him, which was known to the defendant, would not justify the defendant in allowing the son to withdraw any part of the money for his private use.

Appeal of Henry Sproul & Co., defendants, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action of *assumpsit* brought by E. R. Thompson to recover a balance alleged to be due on stock transaction.

In May, 1889, an account was opened in the name of the plaintiff, E. B. Thompson, Sr., with defendant brokers, by the purchase of thirty shares of Central Traction Company stock. The purchase was made by plaintiff's son, E. B. Thompson, Jr., and other purchases were subsequently made through the son, the receipts being made out to E. B. Thompson. Several months after the last purchase of stock, plaintiff's son commenced to buy wheat through defendant brokers, and money credited to the purchaser on the stock account was transferred to the wheat account. The wheat transactions proved disastrous, and defendant sold the traction stock to make good the balance due on the son's account in the wheat deal. Plaintiff now sues to recover an amount which he alleges to be due him on the stock account, disaffirming all knowledge or liability in respect to the wheat

transactions. On the trial both plaintiff and his son testified that the money invested in traction stock belonged to plaintiff.

The following are defendant's points with answers thereto:

1. That, under all the evidence in the case, the verdict must be for the defendant. *Answer:* In other words, that the verdict should be for the defendants. That is refused. It depends upon what we have already said with reference to the notice,—the knowledge of the defendants as to the ownership of this money, and of the party for whose benefit this stock transaction was carried on. (First assignment of error.)

2. That, if the jury believe that the Central Traction stock account was for E. B. Thompson, Sr., and the defendants knew it, and that E. B. Thompson, Jr., was the authorized agent, then all credits must be allowed for moneys appropriated by E. B. Thompson, Jr. *Answer:* That is refused. It is altogether too broad. If the defendants knew, as this point assumes, that the stock was purchased for the plaintiff by the son, the mere fact that the latter was the authorized agent to purchase stock for his father would not excuse the defendants in allowing him (the son) to withdraw the money directed to be used for the purchase of stock, for any other purpose, without the father's consent. (Second assignment of error.)

3. If the jury believe, that the two accounts were for the benefit of the same person, then, under the testimony in this case, the verdict must be for the defendants. *Answer:* That is affirmed. If you believe this transaction from first to last was for the benefit of the son, although the father might have furnished him the money, yet, if it was actually for the benefit of the son,—if the evidence indicates that,—then of course the plaintiff is not entitled to recover here, because he has no interest in the transaction. It would be the son's transaction, and whatever claims the son might have cannot be settled in this case. Therefore, your verdict would have to be for the defendant in that case. (Third assignment of error.)

Verdict and judgment for plaintiff for \$3,112.23, and defendants appeal.

For appellant, *Knox & Reed* and *Edwin W. Smith*.

Contra, Shiras & Dickey.

Opinion by GREEN, J. Filed January 4, 1897.

The learned court below gave to the defendant every possible opportunity to get a verdict, if he could convince the jury of the truth of the facts upon which he based his defense. Upon reading the testimony, however, it is not at all

surprising that the verdict was rendered in favor of the plaintiff, as the evidence in support of his claim was overwhelming. Besides the positive testimony of the plaintiff and his son, through whom the transactions in Central Traction stock were conducted, the various receipts and other writings which emanated from the defendant were almost, if not quite, conclusive, in favor of the plaintiff's contention and against that of the defendant. The opening receipt, upon which the first purchase was made, was to E. B. Thompson, Sr., and all the other receipts for money paid to the defendant's firm, and they were numerous, were to E. B. Thompson. But when the wheat transactions were commenced, and until they were closed, all the letters were addressed to E. B. Thompson, Jr. Now the wheat purchases were not commenced until many months after the last purchase of Central Traction was made. The last of the stock purchases was made on April 18, 1891, and the first purchase of wheat was not made until January 27, 1892. The earliest letter given in evidence from the defendant's firm in relation to wheat was addressed to "E. B. Thompson Jr.," dated March 18, 1892, and notified him that, in pursuance of his instructions, they had that "day sold for your account, and at your risk, 10 thousand May wht. 84 in stop." Every subsequent letter containing similar notices was addressed in the same way, and the transactions were declared to be made "for your account and at your risk." This being the state of the correspondence in relation to both accounts, it would follow, almost as a matter of course, and with the highest persuasive force, that the defendant and his firm (which was changed during the transactions) knew perfectly well that there were two persons with whom they were dealing, one named E. B. Thompson, for whom all the purchases of Central Traction were made, and the other "E. B. Thompson, Jr.," for whom all the wheat transactions were made. It is not necessary to repeat, or even to indicate, the positive and emphatic testimony of both the father and the son, who testify that all the transactions in Central Traction were for the account, and with the money and the securities, of the father, and that the defendant's firm was fully notified of this at the very beginning, when the first deposit was made, and also the equally positive testimony of both that all the transactions in wheat were made at the sole instance of the son, and for his account only, and that the father had no knowledge of them whatever. It is enough to know that there was an abundance of such testimony in the case, that it was

all in parol, and hence was for the consideration of the jury exclusively, and that in no aspect of the case would it have been at all proper to withdraw the evidence from them with a binding instruction for the defendant. A perusal of the testimony satisfies us that the verdict was fully warranted by the testimony.

These views dispose of the first assignment of error.

The answer of the learned court below to the defendant's second point was undoubtedly correct. The point was too broad, as was said by the court. A mere authority from the father to the son to purchase stock for the father, and that being known by the defendant's firm, would certainly not justify the latter in allowing the son to withdraw money from the account for his private use for any purpose. Nor can the fact that the father allowed the son to draw out some of the money, and use it for himself, operate as a general sanction for all the son's acts, nor clothe him with the authority of a general agent.

The third point of the defendant was affirmed. The additional answer by the court was entirely favorable to the defendant. It gave him the opportunity to get a verdict if he could convince the jury that the two accounts were for the benefit of the same person. What was said about that person being the son was entirely correct, in a legal sense, and was the natural comment which the whole contention of the defendant, that it was all intended for the son, would draw from the court. But there was no denial in the answer that, if the person intended in the point was the father, the result of non-liability would follow. The great stumbling-block in the defendant's way still remained, to wit, the hypothesis that the two accounts were for the benefit of the same person. The jury, manifestly, did not believe anything of that kind, nor is it possible to see how they could have entertained such a belief. The whole drift of the defense was the contention that the two accounts were for the benefit of the son, and not of the father. It was to that aspect of the case that the mind, both of the court and the jury, was directed, and it was very natural for the court to so interpret the meaning. If the point was intended to include the plaintiff in the category "of same person," candor would require that idea to be more explicitly conveyed. Otherwise, the generality of the phrase is misleading. Even if the court were technically in error in omitting to attract the attention of the jury to the proposition of the point as applied to the father, instead of the son, we would not reverse for such a reason, but would hold

the omission of the court to be due to the want of clearness in the point. But the court was not in technical error, because the point was flatly affirmed. *Judgment affirmed.*

MURPHY et al. v. LIBERTY NATIONAL BANK.

In an action for the balance due under a building contract, the statement showed that a portion of the work was torn down because of the alleged negligence of the architect, and the contract therefor given to a third person; that the building was not completed within the specified time, an excuse therefor being alleged; and also that compensation for extra work was claimed. *Held*, that an affidavit of defense setting up a claim for the penalty for delay in the completion of the building, and alleging that the architect had only allowed a certain amount for extra work, and that plaintiff failed to finish the building according to the contract, and did especially fail to finish it to the satisfaction of the architect, as required by the contract, is sufficient.

Appeal of Liberty National Bank, defendant, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, entered for want of a sufficient affidavit of defense in a *scire facias sur mechanic's lien* brought by James A. Murphy and Thomas J. Hamilton, trading as Murphy & Hamilton.

The facts are stated in the opinion of the Supreme Court, *infra*.

For appellant, *M. W. Acheson, Jr., George C. Wilson and William D. Evans.*

Contra, E. G. & J. S. Ferguson.

Opinion by GREEN, J. Filed January 4, 1897.

The claim of the plaintiffs is founded upon a written and sealed contract for the entire erection by the plaintiffs for the defendant, of a bank building in the east end of the city of Pittsburgh, for the round sum of \$50,000. The contractors were to furnish everything, all the materials and all the labor of every kind, and they were to perform the contract "under the direction and supervision, and to the satisfaction of F. J. Osterling, architect, and the building committee (acting in behalf of said owners)." One of the sections of the agreement, the 10th, provided that the payments should be made in various sums, and at the completion of various stages of the structure, the last of which was thus described: "Eighth payment when entirely completed to the satisfaction of the owners and architect,—\$10,000."

In the plaintiffs' statement of claim it is asserted that while they aver that they furnished material of the kind and quality provided for in the plans and specifications, and did their work in good and workmanlike manner, "yet owing to an error in the judgment of the archi-

tect for the erection of said building in preparing plans and specifications for the erection thereof the iron beams and their supports called for by the plans and specifications, used to support all the fireproofing were too light, and no sufficient to bear the weight of the said several floors, and that by reason thereof portions of said floors fell in, and in order to prevent balance thereof from falling in, claimants, by order of said architect, proceeded to and did tear out and remove so much of the fireproofing above the first floor as had not then fallen in. That said architect in order to remedy the trouble caused by his error, without the consent or approval of, and in face of the direct opposition on the part of claimants, made a separate contract for the placing of the fireproofing in said building, and the fireproofing placed in said building by said architect under said contract was not of the kind and character provided for in the plans and specifications for the erection of the said building, the building committee for the erection of said building and the architect having previously selected and approved fireproofing of the kind and character put in by claimants. The claimants further aver that the act of the architect in making said contract for putting in fireproofing to take the place of that which had fallen down, or been taken down by the claimants for the causes aforesaid, was not justifiable, and not in accordance with the contract for the erection of said building or the specifications, and was wholly unwarranted." The statement further avers that the claimants were prevented by these actions of the architect and building committee from completing the building at the time specified in the contract, to wit, by January 1, 1895, ready for occupancy, and entirely by March 1 following, and that they did finish it by May 27 following, and concludes as follows: "That their failure to complete the same at the time provided for by said contract was occasioned by the causes hereinbefore recited, and by the unwarranted act of the architect as aforesaid. They therefore aver that they are not bound by the provisions of said contract as to the time of completion of said building." The contract is made part of the plaintiffs' statement, and also a bill of particulars, in which, as well as in the statement, they make a claim for \$1,565.85 of extra work, of which they assert \$625.06 was occasioned "by the error of the architect hereinbefore mentioned." The seventh article of the contract provides that the claimants shall make no claim for additional or extra work unless it shall be done in pursuance of a written order from the architect, and notice of all claims shall be made to the architect in

writing within ten days of the beginning of such work. The fifth section of the contract provides a penalty of \$20 per day for every day's delay in finishing the work after the time specified in the contract.

All of the foregoing appears in the plaintiffs' statement of claim, and the active elements of serious disputes between the parties are at once apparent before the filing of any affidavit of defense. It is of course manifest that the work was not prosecuted and was never finished by the plaintiffs, "to the satisfaction of the owners and architect," and the title to the last payment of \$10,000 is immediately called in question. A claim for the penalty of \$20 per day for the delay would necessarily be made, and in fact was made by the defendant, and the plaintiff's claim • for extra work, being in contravention of the words of the contract, would necessarily require proof of facts extrinsic to the contract to sustain it in any point of view. The statement having also alleged that the architect erred in his judgment as to the fireproofing and ordered that which was put in by the plaintiffs to be taken down, and thereupon made another contract with other parties to put in other fireproofing which was furnished by such other parties, at once, and by the most necessary consequence develops not merely a serious controversy as to disputed facts, but puts the burden of proving the correctness of the plaintiffs' claim upon them, as it would depend entirely upon the adequacy of their affirmative proof in support of their allegations of fact, and upon their legal sufficiency to operate so as to defeat the explicit language of the contract, which required everything to be done by the direction and under the supervision of the architect, and to the satisfaction of the architect and the building committee. It is highly questionable whether under the old system of pleading any affidavit of defense would be necessary to prevent judgment under such a statement of claim. The whole fireproofing part of the work, a most serious item in the erection of such a building, is taken out of the operation of the contract, by the express allegations contained in the plaintiffs' statement, because it is there specifically averred that the fireproofing first put in by them fell down and the whole of it was taken out and other fireproofing was put in by outside parties, under another contract made by the architect. Granting that the plaintiffs' claim in this respect is correct, it most certainly must be established by proof of the necessary facts to sustain it, and all of such proof must necessarily be *dehors* the contract. The plaintiffs' claim is under the contract, for the whole contract price,

and for extra work besides, and yet their statement admits, indeed asserts, that a very important part of the work done by them was rejected by the architect and was furnished by other parties, and that they have quite a serious claim for extra work in contravention of the express terms of the contract. They also admit and declare that they did not finish the building until long after it was to be finished according to the positive terms of the contract, and thereby exhibit an apparent right in the defendant to claim the payment of the penalty. How can any court determine the right and justice of the plaintiffs' claim for a judgment for the whole amount of the contract price and the claim for extra work, upon the mere inspection of the plaintiffs' statement? It is not possible because the determination of their claim does not depend alone upon the terms of the contract. It requires the help of supporting proof of facts outside of the contract. A very mild affidavit of defense is all that is needed to carry such a case to the jury. The affidavit of defense filed in this case, while it might have been somewhat more specific than it is, as to some matters, for instance, as to liens filed by other parties, is quite sufficient for the purpose heretofore indicated. It positively avers that the plaintiffs "failed, omitted, neglected and refused to perform and finish said building according to the express terms and provisions in said contract set forth, and did especially fail, omit, neglect and refuse to perform said contract and finish said building under the direction and supervision, and to the satisfaction of F. J. Osterling, architect, and the building committee acting in behalf of the owner." As this same matter had been affirmatively set forth in the plaintiffs' statement, with a special detail of the particular facts as to one important matter, a repetition of these details was not necessary as it might have been had there been nothing said about it in the statement of claim. The allegation that the building was to be furnished to the defendant, free and discharged of all liens and encumbrances, while there is no express condition of that kind in the agreement, yet it does assert that the legal duty of the plaintiffs was to so complete and deliver the building as that the owner would not be liable beyond the sum of \$50,000 as the cost of the building as between the defendant and the plaintiffs. When the affidavit of defense further avers that the building had not yet been completed when the affidavit was made, and was still subject to claims for work done and materials furnished for its construction, and that liens amounting to \$9,000 had been filed against it, and that, upon informa-

tion, other liens were yet to be filed, we think there was a sufficient averment to prevent judgment for the whole \$50,000. The claim for the penalty is fully set out in the affidavit, and a specific claim for \$2,440 for a 122 days' delay is expressly stated. The affidavit further alleges that the architect had only allowed the plaintiffs \$522.38 for extras and asserted that the plaintiffs' total claim was, therefore, \$50,522.88, and thereby disputed the claim of \$1,565.85 for extras set up in the plaintiffs' statement. It would have been more suitable to specifically deny the correctness of the plaintiffs' claim for extras except to the amount allowed, but we do not think the plaintiffs would be entitled to judgment for their whole claim, or for the difference between that sum and the amount allowed, as their title to have judgment at all would depend upon affirmative proof that they could have any such judgment without the allowance of the architect under the terms of the contract. Without going into more minute details we think, in view of the peculiar character of the plaintiffs' claim, and of the matters of disputed fact which appear upon the face of the statement, it would be necessary to submit the case to a jury to determine the essential matters in controversy. For that purpose we think the affidavit of defense is sufficient in connection with the matters of dispute which are apparent upon the statement. These views render it unnecessary to consider the other subjects of contention appearing in the paper books.

Judgment reversed and procedendo awarded.

STRAW v. MURPHY et al.

One member of a partnership satisfied a mechanic's lien. The other member then filed a petition to have this satisfaction stricken off as fraudulent. To relieve the owner of the property the contractor, by agreement of the parties, pays the money into a bank to await the determination of the question, and a second satisfaction of the lien is then entered by the second partner. The court discharges the rule to strike off the first satisfaction. *Held*, that it should then make absolute a rule on the bank to pay to the contractor, as the decision refusing to strike off the satisfaction amounted to a decision that he was entitled to the money.

Appeal of Elizabeth Murphy, owner or reputed owner, and Harry J. Smith, contractor, defendants, from an order of the Court of Common Pleas No. 2, of Allegheny county, discharging a rule to show cause why the sum of \$1,172.72 in the Bank of Secured Savings should not be paid to H. J. Smith.

The facts appear by the opinion of the Supreme Court, *infra*.

For appellant, *Hudson & McCue*.

Contra, *James Fitzsimmons*.

Opinion by MITCHELL, J. Filed January 4, 1897.

This case, as the learned judge below remarked, is very badly mixed, and the court has added greatly to the uncertainty by its failure to indicate the grounds of its action in discharging the appellant's rule for an order that the fund in bank be paid to him. Not having the assistance of its views on this point we have been obliged to seek for the reasons through a very confused record, and have been forced to the conclusion that if the rule was discharged on the merits the result was in conflict with the court's previous action on the rule to strike off satisfaction of the lien; and if on the form of the remedy sought, the objections were allowed undue weight.

The substantial question in the first aspect, is whether or not the appellant's claim to the money in bank has been already adjudicated. Appellant was the contractor for the erection of certain houses, and Straw & Henry, co-partners, were subcontractors under him for brick work, etc. The subcontractors were unable to go on with the work, and by agreement appellant took it off their hands and completed it. The partners having quarreled, a lien was filed in their name for the work, which embarrassed the owner and the contractor in getting funds for settlement. Thereupon the contractor (appellant) settled with Henry, one of the partners, and the latter satisfied the liens of record. At this point the present litigation began by Straw, the other partner, obtaining a rule to strike off the entry of satisfaction. In his petition he sets forth the partnership, the contract, the turning over of the work to appellant for completion, the failure of Henry to supply his part of the money, his insolvency, and the consequent liability of petitioner for the debts incurred for materials, the filing of the lien, etc. The petition then continues that Henry, for the purpose of cheating and defrauding the petitioner, had, without his knowledge or consent, fraudulently satisfied the said lien, although receiving no consideration therefor, and that this action was taken by Henry for the purpose of collecting and receiving the money due on said lien, and of appropriating the same to his own use, and thereby rendering petitioner liable for all the claims of the material-men. He therefore prayed that the satisfaction should be stricken off and the lien reinstated. It will be observed that appellant is not charged with any participation in the alleged fraud of Henry, nor was the rule asked or granted against him. He, however, intervened on his own petition, setting forth that the owner was fully protected and

had no interest; that Henry had been paid in full, and petitioner (appellant) was therefore the only person having any substantial interest in the matter. The court ordered him to be made party to the rule, answers were filed by him and by Henry, and thereafter the controversy proceeded between him and Straw, the issue being whether, as against appellant, the settlement with Henry, and the latter's entry of satisfaction on the lien, was a fraud on Straw which should be stricken off.

During the taking of testimony on the rule, the owner of the houses, Mrs. Murphy, desiring to be relieved from the lien, paid the amount into the Bank of Secured Savings under an agreement of all parties, which will be noticed hereafter, and a second satisfaction was entered on the record of the lien. It is contended by the appellees, and it is the main argument in support of the order of the court, that this arrangement put an end to the application to strike off the first satisfaction entered by Henry, and the court could do nothing but discharge the rule, as it would be of no value whatever to any one to strike off the first satisfaction after an admittedly valid second one had been entered by consent of all parties. Certainly, the most regular and convenient practice would have been to discharge the pending rule without prejudice and award an issue to determine the title to the fund in bank. But this course was not taken. The terms of the agreement and the conduct of the parties all show that the contest proceeded on the old issue. Testimony continued to be taken for a month later, and when it was completed it was submitted to the court, with the agreement that the decision should be final, except that the right of appeal was reserved. This apparent contradiction will be noticed hereafter. The only effect of the arrangement, therefore, was to substitute the fund for the lien of the record, and the parties went on to determine the right to the money just as they would have determined the right to the lien had the arrangement not been made. The whole matter of the settlement by appellant with Henry, and the latter's entry of satisfaction was gone into in the testimony, was submitted to the court for decision, and the opinion of the court shows that it was considered and decided. "The burden of proof," says the learned judge, "is on the party taking this rule to show that the satisfaction was wrongfully made. After a carefully consideration of the testimony, I am not satisfied the satisfaction should be stricken off and the lien reinstated." A bill which I have examined is pending in which Straw is complainant, and on that he

may get a decree for account, with perhaps a balance in his favor against Henry, but with this the appellant has now nothing to do. His claim to this fund has been once adjudicated, and is not open to further question. The application that Straw made was to the equity powers of the court to undo the act of his partner on the ground of fraud, and the court having considered the case on the merits, its decision was a bar to any subsequent contest of the same matter, either on motion or by formal bill: *Gordinier's Appeal*, 89 Pa. 528; *Frauenthal's Appeal*, 100 Id. 290; *Morgan's Appeal*, 110 Id. 271; *Given's Appeal*, 121 Id. 280; *Ahl v. Goodhart*, 161 Id. 455; *Wilson v. Buchanan*, 170 Id. 14. In this last case the subject was fully discussed by our Brother FELL, and it was shown that the earlier case of *Wistar v. McManus*, 54 Pa. 318, was a departure from principle on this point, and has now been decisively overruled.

Coming now to the second matter, the form of the relief sought is certainly not so scientific or so convenient as an issue directly on the title to the fund, but the objections do not go to the substantial merits, and are not insuperable in a court of equity. The agreement of all parties under which the money was paid into the bank, stipulates that the agreement and satisfaction of the lien are in "nowise to affect any litigation now pending or that may hereafter be brought, nor is it to be referred to in any proceedings, except that after the decision of said Common Pleas No. 2 is made, or any appeal therefrom to the Supreme Court is finally decided, should any party take such appeal, it shall be used for the purpose of having an order to disburse said fund in accordance with said decision." Here, then, is a specific provision by all the parties in the very creation and deposit of the fund, that it shall be paid out on the order of the court, either the Common Pleas, or, if on appeal, by the Supreme Court, upon final decision. And this provision explains the seeming paradox in the agreement of counsel submitting the case to the court,—that the decision shall be final, but reserving the right of appeal. Though somewhat Hibernian in expression, the meaning is clear that the decision, whether of the Common Pleas unappealed from, or of the Supreme Court on appeal, is to be final among all the parties as to the right to this fund. In the face of these agreements the parties cannot be heard to object to the order prayed for, and the only other party concerned, the Bank of Secured Savings, comes in and answers that it received the money on the terms specified in the agreement, and is ready and willing to pay it out to such persons as the court may direct.

The order discharging the rule is reversed, and the rule is made absolute, and the Bank of Secured Savings is directed to pay the fund in controversy, less any proper charges and deductions, to appellant, Harry J. Smith, or his assigns. Costs of this appeal to be paid by appellee.

JACKSON'S ESTATE.

Appeal of ROBERT JACKSON.

Testator gave his son R. and daughter C. the home farm of 90 acres and all farming utensils and stock, in equal shares, and directed that "if my daughter C. dies unmarried, her brother R. shall have what remains of her share of my property, and if she marries, then her brother R. shall pay her \$1,000 as her share of my estate." *Held*, that the quoted words refer to a marrying or dying unmarried during testator's lifetime, and not after.

Appeal of Robert Jackson, from the decree of the Orphans' Court of Beaver county, overruling his answer to a petition for partition of the estate of their father, James Jackson, by his sister Catharine.

James Jackson, the testator whose will is the subject of dispute in this suit, made his last will and testament on November 18, 1890, and died on December 3, 1890, fifteen days after the execution of his will. His wife had died in 1880, and from that time to the day of his decease his family consisted of himself, his son Robert, over 40 years of age, at the time of his decease, and his daughter Catharine, over 50 years of age, at the time of his decease, and a grandson, William Webber Jackson. By his will he provided as follows:

Item 1, I will and bequeath to my son Robert Jackson and my daughter Catharine Jackson the homestead farm of ninety acres with all the farming utensils stock horses cows and young stock and household and kitchen furniture to each share and share alike and if my daughter Catharine dies unmarried her brother Robert shall have what remains of her share of my property and if she marries then her brother Robert shall pay her one thousand dollars as her share of my said estate; also to my son Robert, and my daughter Catharine, my farm of twenty-two acres, more or less, situate in the same township as Homestead (known as the "Webber Farm.")

After James Jackson's decease, Robert and Catharine remained in possession of the farm, and Catharine, contending that she had an undivided one-half interest in fee in the lands devised to her and Robert by her deceased father, on the 8th day of November, 1892, filed her petition in the Orphans' Court, praying to have the lands devised to her and Robert divided.

To this petition Robert Jackson, on the 5th day of December, 1892, filed an answer, alleging that Catharine Jackson was not a tenant in common seized of an undivided one-half interest

of said land in fee, but that at most she had but a defeasible estate, liable to be determined on her marriage, and certainly at her decease, and that he was the owner of one-half thereof in fee and had a vested remainder in the other half thereof. After argument, the court, on May 1, 1893, overruled the answer and awarded an inquest to make partition. The inquest returned the land divided into purparts "A" and "B." Upon the return of a rule to accept or refuse, Catharine Jackson offered to bid on purpart "A," to which Robert Jackson objected. The court overruled the objection and permitted Catharine to bid. But purpart "A" was awarded to Robert on a higher bid.

All parties in interest refusing to accept purpart "B" at the valuation, it was directed to be sold by a trustee, which was afterwards done and purchased by Robert. On December 15, 1893, the report of the inquest was confirmed absolutely and the usual judgment of partition was entered of record.

Robert Jackson took this appeal, and assigned as error the overruling of the appellant's answer to the petition for partition, the overruling of appellant's objection to the bid of Catharine Jackson, and the decree of the court in entering judgment of partition as to the premises.

For appellant, *Alfred P. Marshall, John M. Buchanan and William A. McConnell.*

Contra, Louis E. Grim and David S. Naugle.

Opinion by FELL, J. Filed January 4, 1897.

In the case of *Jessup v. Smuck*, 16 Pa. 327, relied on by the appellant, the son whose estate was held to be limited was treated in the will as living at a period subsequent to the death of the testator, and the terms in which contingency and limitation were expressed were considered as repelling the inference that the testator contemplated the death of the first taker before his own. The principle that the devise of a fee absolute in the first instance cannot be reduced to an estate for life unless the intention to do so is clear is recognized in the opinion, and the case is not in conflict with the rule of construction so often stated in our cases from *Biddle's Estate*, 28 Pa. 59, to *Mitchell v. P., Ft. W. & C. Ry.*, 165 Pa. 645, that where the gift is plainly a fee-simple to take effect immediately in possession a devise over in case of the death of the first taker means his death in the lifetime of the testator. The decision of the learned judge of the Orphans' Court is in harmony with the general rules of construction and with the Act of April, 1833, which provides that "all devises of real estate shall pass the whole estate of the testator in the premises devised, although

there are no words of inheritance or perpetuity unless it appears by a devise over or by words of limitation or otherwise in the will that the testator intended to devise a less estate." The construction, if it is necessary to resort to the established rules, should be in favor of the first rather than of the second taker; of an absolute or vested estate rather than of a defeasible or contingent one; of a general or primary intent rather than of a particular or secondary one; *Smith's Appeal*, 23 Pa. 9; *Etter's Estate*, 23 Id. 381; *Letchworth's Appeal*, 30 Id. 175; *Womrath v. McCormick*, 51 Id. 504.

This construction, we think, gives effect to the actual intent. The real estate devised by the testator to his daughter was worth about \$8,200. The stock on the farm was owned by the son. The testator's daughter had always lived with him, and for ten years had had sole charge of his house. Her proportion of the charge imposed—the payment of the legacy to another son and the maintenance and education of the testator's grandson—amounted to more than the value of a life estate in one-half of the farm, and unless this construction be given she takes nothing of value under the provisions of a will certainly intended to be of substantial benefit to her. The implication arising from the words "what remains" is that she had an unlimited power of disposal, which is inconsistent with the existence of a valid limitation over. In the first instance he gives her a vested estate unlimited in point of duration, and that the subsequent provisions were meant to become operative only in the event of her death in his lifetime is quite as probable as any other supposition. There is at least no clear evidence of a contrary intent, and the law regards with disfavor conditions subsequent divesting or reducing a vested estate.

The assignments of error are overruled and the order of the Orphans' Court is affirmed at the cost of the appellant.

Court of Common Pleas No. 1. ALLEGHENY COUNTY.

PALMER v. LEADER PUBLISHING CO.

The court has the right to set aside a verdict because the damages allowed are inadequate.

Where the plaintiff in a libel suit does not show any special damage and the jury render a verdict giving him merely nominal damages the court will not set aside the verdict and grant a new trial in order to allow him another chance to recover vindictive damages.

No. 274 Dec. T., 1892. Motion and reasons for new trial.

Opinion by STOWE, P. J. Filed January 28, 1897.

While it is clear that courts have the power, and it often becomes their duty to grant new trials, in cases where the verdict of the jury is inconsistent with the evidence adduced upon the trial, yet it is a power which should be exercised with great caution and discrimination, so that it may not be subversive of the right vested in a jury to determine all questions of fact submitted by the court for their determination, and to this end certain rules have been recognized as proper to regulate the action of the court in such cases. The right to set aside a verdict sounding merely in damages for torts because in the opinion of the court, it may be excessive cannot be questioned, and is constantly exercised, and the same right exists also when the verdict is unreasonably small, but in the latter case the *general rule* is that a new trial will not be granted to enable the plaintiff to recover vindictive damages, except where the action is brought to determine a permanent right: *Hilliard on New Trials*, chap. 7, sec. 21.

And in section 23 of the same chapter it is said "a verdict will not be set aside *merely* for the small amount of damages, however trifling it may be, as when it was for a half farthing." And section 24, "nor will it be granted unless the verdict is wholly inconsistent with the evidence and there is a total refusal of the jurors to discharge their duties."

While this rule is not without exceptions, there should be some special circumstances taking the case out of the general rule, such as where the circumstances furnish a reasonably certain measure of damages.

Now, turning our attention to the case in hand, we find the defendant to have published the libel charged, copied from a prominent and responsible newspaper of Philadelphia as a matter of general news, and without any evidence of actual malice. That the article was grossly libelous is beyond question, and such as would have justified the jury in imposing heavy vindictive damages. But plaintiff rested upon the mere legal right arising out of the nature of the publication itself. He made no attempt to show the jury how or to what extent, if any, it had injured him in his business, or in his business or social relations, and the jury had nothing to guide them in relation to a pecuniary compensation for the wrong done by him, and therefore it had nothing upon which it could properly base a verdict by way of compensation for the actual and specific injury or damage done him by the publication of the article in question. He chose to take his chance upon the general

legal liability of defendant under the law giving the jury the right to judge for themselves to what extent he had been injured by the publication, and to determine to what extent damages ought to be imposed by way of punishment.

This, under the instructions from the court, it was their duty to do, they being told that under any aspect of the case they must render a verdict for plaintiff for at least nominal damages, but beyond that it was for it to say what should be allowed by way of compensation or punishment, either or both. In rendering a verdict for nominal damages alone they did simply what they were told they had a right to do, and we cannot say that they did wrong in a legal point of view. As before stated, no evidence was given of the actual damage done plaintiff, and as to whether vindictive damages should be allowed was solely a matter within the discretion of the jury.

In our own case of *Neeb v. Hope*, 111 Pa. 145, the Supreme Court say: "Compensation for the injury done is the measure of damages, punitive damages is for the jury." And again, "It is for the jury and not the court to determine whether the defendant shall pay exemplary damages, even where there is malice. Whenever the jury find that the defendant shall pay smart money, they determine the amount, and it may be added to plaintiff's real damage."

The jury allowed what it was told it must allow—nominal damages. Beyond that the question was for it alone, under the evidence, and no special or actual damage being shown to have accrued to plaintiff, we cannot say the verdict was either unreasonable or against the weight of the evidence.

A new trial is therefore refused.

For plaintiff, *S. J. Graham*.

For defendant, *W. B. Rodgers*.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

CLARK'S SON & CO. v. PITTSBURGH NATURAL GAS COMPANY et al.

An appeal to the Supreme Court from a decree in equity of the Court of Common Pleas is not a *supersedeas* unless allowed to be so by the court below or by the Supreme Court.

Under the Act of Assembly providing for appeals from the decree of a Court of Common Pleas, an appeal from a decree appointing a receiver for a corporation does not act as a *supersedeas*.

No. 215 July T., 1891. In Equity. Petition of defendants for stay of proceedings, pending appeal to the Supreme Court.

Opinion by EWING, P. J. Filed November 18, 1896.

In this case the court, approving the master's findings and having examined into a large amount of testimony taken in the case, entered a decree against the defendants and, *inter alia*, a decree appointing a receiver for the Pittsburgh Natural Gas Company, of which the members of Park Bro. & Co., Limited, are the sole directors and officers. The defendants entered appeals from this decree and gave bond approved by the court. In regular order, the case will be argued in the Supreme Court in November, 1897, and will be decided in January, 1898.

The defendants now come into court, asking for an order superseding the appointment of a receiver, on the ground, and the sole ground, that the appeal in this case is a *supersedeas*. The plaintiffs, by their counsel, deny that the bill is a *supersedeas*, so far as the appointment of a receiver and his taking possession of the property of the Natural Gas Company is concerned.

Cases are cited, on the part of the defendants, case showing that an appeal or writ of error in a law is a *supersedeas*, and also, it is claimed, that it is equally a *supersedeas* in equity. We do not take this view of the case; the rule, as we understand it, being that, in equity cases, an appeal is a *supersedeas* only when by statute or rule of the court it is so made, or until an order be made, either in the court below, from which the appeal is taken to operate as a *supersedeas*, or an order from the higher court, to which the appeal is taken, and this order to be made by either court is a matter of discretion, unless the statute or standing rule of court provides for the appeal being a *supersedeas*.

We had occasion to examine this question in the case of the *City of Allegheny v. The Pittsburgh, Allegheny & Manchester Pass. Ry. Co.*, No. 282 October Term, 1884, and, in an opinion filed, discussed the authorities and came to the conclusion that, in that case, the appeal to the higher court was not a *supersedeas*. The same general question was discussed and decided in *Barker v. The Hartman Steel Co.*, 38 PITTSBURGH LEGAL JOURNAL, 205, by Judge WICKHAM.

Our Acts of Assembly in relation to equity jurisdiction of the courts, from the first acts in relation thereto and the Act of 1836 down, assumes that the equity jurisdiction of the courts will be exercised in accordance with the general rules of chancery practice, and the equity rules adopted by the Supreme Court of this State are also based upon this assumption. It is so true that it may properly be said

that the equity practice as adopted by the English Court of Chancery is the common law of equity practice in this country, and especially of this State. In England it is well settled that an appeal from a decree in equity is, as a general rule, not a *supersedeas*, unless it be ordered by the court below or the higher court, and the practice is to apply to the court below, and that is the general practice in this country: *Barrs v. Fewkes*, 1 L. R. Eq. 392; *Harrington v. Harrington*, 3 L. R. Ch. App. 575. The latter case was an application to have the defendant allowed to retain the possession of certain articles of personal property which he had been ordered to give up.

The same ruling has been made by the Supreme Court of the United States in the *Slaughter-House Cases*, 10 Wall. 273, and other cases, and by the Supreme Court of this State in the recent case of *Haught v. Irwin*, 166 Pa. 548.

In this case, so far as the decree for the payment of money by Park Bro. & Co., Limited, is concerned, the very terms of the decree provided against the collection of that by the receiver until the further order of the court, so that no order is necessary in that respect, and the appeal would be a *supersedeas* as to that. It, perhaps, would be a *supersedeas* to an order of sale by the receiver in this case, pending appeal.

It comes down, then, to the question as to whether or not the Act of Assembly providing for appeals from the decrees of a Court of Common Pleas makes it a *supersedeas* in this case, and we are unable to read any of the provisions of that act so as to include the case of the appointment of a receiver for a corporation. The Court of Common Pleas and the Supreme Court have expressly given to them "the supervision and control of all corporations." If the officers of a corporation which has been mismanaged and rendered insolvent by its directors, officers and managers, can, simply by taking an appeal to the Supreme Court, continue in possession and control of the corporation which they have wrecked, then, in many cases, the appointment of a receiver by the court below would be a vain act. It would, in the end, be immaterial whether the decree should be affirmed or reversed.

We do not understand that the statute, or any rule of the Supreme Court, or any of the rules of the equity practice, make the appeal in this case a *supersedeas*.

There are cases, and many cases, where the appeal is not *ipso facto* a *supersedeas*, that the court below would and should stay proceedings until the appeal is decided, and we always pre-

fer to be able so to do without risking injury to the parties.

In this case, as we have heretofore stated in an opinion filed, the main contention is, in fact, between minority stockholders and Park Bro. & Co., Limited, who own a majority of the stock. The defendants, having this majority, have practically had the whole control and management of the affairs of the corporation since June, 1892, they have entirely excluded the minority from any control whatever. Since February, 1892, they have taken the entire large product of the gas company at their own price, being in absolute and entire control of the affairs of the company. They have contracted with themselves, on their own terms, without any regard to either the public duties devolved upon them by their franchise as a natural gas company, or to the right of the minority stockholder. If they manifested any disposition to change this manner of managing the concern, we would be entirely willing to order that the receiver should not proceed, but should yield possession of the property to its managers or to the members of Park Bro. & Co., Limited; but under their management, while taking the entire product of the gas company (if the charges that they have made, and they, as managers, have allowed against the company for damages, be allowed), the gas company was made insolvent as early as July, 1892, and under their management it has been steadily getting worse in debt and the property becoming less and less valuable. The management of a receiver can scarcely be worse for the community at large, or for the minority stockholders, or for the corporation as such, than the management of those who have been in sole charge for four and a half years.

Now, November 18, 1896, after argument and upon consideration, the court refuses to stay proceedings on that part of the decree appointing a receiver and directing him to take charge of the property of the Pittsburgh Natural Gas Company.

(On November 21, 1896, upon petition of defendants, at No. 18 October Term, 1896, Supreme Court, Western District, Chief Justice STERRETT granted a rule to show cause why the appeal taken in this case should not be decreed to be a *supersedeas* of all proceedings in the court below, and on January 4, 1897, the return-day thereof, this rule was discharged without opinion by the Supreme Court *in banc*.)

For petition, *Watson & McCleave and Dalsell, Scott & Gordon*.

Contra, *M. A. Woodward and Shtras & Dickey*.

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PITTSBURGH, PA., MARCH 24, 1897.

Supreme Court, Penn'a.

PHILSON v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

In a suit by an assignee of a policy of life insurance where the defense is that payment had been made to the beneficiary named in the policy, upon proof deemed sufficient that the policy had been mislaid or lost, and that the company never had notice of the assignment relied on in the suit, in conformity with the stipulation printed on the policy, and a waiver is averred in replication, which is sought to be established by a letter of the secretary of the company to the assignee of the policy, it is error to leave the construction of this letter to the jury, whether it should operate as a waiver is a question of law.

Appeal of the Mutual Life Insurance Company of New York, from the judgment of the Court of Common Pleas of Somerset county, in an action of *assumpsit*, wherein Frances Corcoran, for use of William H. Dill, for use of S. B. Philson, cashier, was plaintiff.

The facts of the case appearing at the trial, before LONGENECKER, P. J., were as follows:

The defendant issued to Frances Corcoran, wife of James Corcoran, a policy for \$4,000, on the life of her husband.

The policy referred to the application, and in terms made it a part of the contract of insurance, and declared that the contract was fully set forth in the policy and the application taken together, and that none of its terms could be modified or any forfeiture under it waived, except by an agreement in writing signed by the president or secretary of the company, whose authority for the purpose would not be delegated.

On the back of the policy, under the head of "assignments," appeared a clause which provided "that this company will not take notice of any assignment of this policy until a duplicate or certified copy thereof shall be delivered to the company at its principal office, and under no circumstances will the company assume any responsibility for the validity of such assignment."

On the face of the application, under the head of assignments, appeared a clause which provided that "this company will not take notice

of any assignment of this policy until a duplicate or a certified copy thereof shall be delivered to the company at its principal office, and under no circumstances will the company assume any responsibility for the validity of such assignment;" and "if any claim be made under an assignment, proof of interest to the extent of the claim will be required."

James Corcoran died on January 3, 1894, leaving to survive his wife Frances and three children.

After the death of James Corcoran, the beneficiary, Frances Corcoran, made due proof of his death; and believing that the policy was lost or mislaid, made proof thereof, according to the custom and usages of the company, and gave bond of indemnity to the company. In the proof of loss she alleged that she last saw the policy in 1890 or 1891, and did not know what had become of it since.

The defendant then paid Mrs. Corcoran the amount due on the policy. After the payment to Frances Corcoran, S. B. Philson, the use plaintiff, brought suit against the company and claimed to recover on the ground that the policy had been assigned on October 13, 1890, by James Corcoran and Frances Corcoran, to W. H. Dill, as collateral to a note for \$2,500, and by Dill, on the 10th of March, 1892, assigned to "S. B. Philson, cashier." There was evidence on behalf of the plaintiff that the policy and the assignment were taken to the general agent's office in Philadelphia, in 1892, and the witness testified that one of the clerks, in the absence of the general agent, took the policy and assignment and a letter of the plaintiff and read them and it was the witness' impression that he made a memorandum in a book.

On March 29, 1892, the plaintiff had written to the head office of the company in New York and inquired, "Shall I forward the policy for your acceptance, or will the assignment be sufficient if it is presented for acceptance?"

On April 2, 1892, H. E. Duncan, corresponding secretary of the said company, wrote in answer:

"If we are furnished with duplicates or certified copies of the transfer, we will file them as notice of claim;" and in same letter said: "Please communicate with the company through our general agent, W. H. Lambert, Philadelphia, Pa."

The plaintiff asked the court, *inter alia*, to charge:

"If the jury believe that shortly after the assignment of the policy of William H. Dill to S. B. Philson, and in the lifetime of James Corcoran, the said S. B. Philson notified the de-

defendant company of the assignment of Frances Corcoran and James Corcoran, dated October 18, 1890, to Wm. H. Dill, and of the assignment by W. H. Dill to S. B. Philson, dated March 10, 1892, with the inquiry if he should forward the policy for the acceptance of the company, or if the assignments would be sufficient if presented for acceptance, with request for reply; and that H. E. Duncan, Jr., corresponding secretary of defendant company, in writing, directed said Philson to communicate with the company through the company's general agent, W. H. Lambert, of Philadelphia, Pa., and that said Philson promptly thereafter, in April, 1892, caused the original policy, with the original assignments attached thereto, to be exhibited at the office of said general agent, Wm. H. Lambert, at Philadelphia, Pa., during business hours, to one of the clerks of said Lambert in charge of the business of said general agent—the said Lambert then being temporarily absent from the office—and that said clerk examined said policy and assignments, and after examination carried the said policy and assignments to a book or record in said office and examined and compared the policy, assignments and such book or record, and wrote or feigned to write in or upon said book, and afterwards returned the policy and assignments to the person who at said Philson's direction had presented them; and that said Philson subsequently and in the lifetime of said James Corcoran had correspondence with the defendant company at New York, stating to the company in said correspondence that he held the policy as collateral security, and asking if the company would purchase it if he acquired an assignment of it for its cash value—an absolute assignment; and correspondence also with said Wm. H. Lambert, general agent, also in the lifetime of James Corcoran, inquiring if all payments had been made on said policy, and if it was good for \$4,000 in the event of the death of James Corcoran, then the jury may infer that the company waived the requirements referred to in the policy, that the company will not take notice of any assignment of the policy until a duplicate or certified copy thereof shall be delivered to the company at its principal office."

The court answered: "If you find the facts as given in the point, and that the company by directing the plaintiff to communicate through Mr. Lambert, intended to waive presentation of the papers at the principal office in New York, and also that when the policy and the assignments were presented at the office of Mr. Lambert, the latter by his agent waived a formal compliance with the conditions on the back

of the policy relative to assignments, requiring a duplicate or certified copy thereof to be delivered to the company, the law of the point is correct. I leave it to you to ascertain from all the evidence bearing upon it whether such waiver was intended." (Third assignment of error.)

Plaintiff further asked the court to charge:—

"As the evidence in the case shows that the defendant company paid the amount of the policy to Frances Corcoran without a surrender of the policy, and without due proof of the loss or destruction of said policy, the presumption was that the policy was outstanding in the hands of S. B. Philson, of which the evidence shows the company had knowledge by letter and otherwise the company cannot set up the payment of the policy to Frances Corcoran as a defense to this action."

The court answered: "If the facts are as stated the mere ground of payment to Mrs. Corcoran cannot avail to defeat the plaintiff's action." (Fourth assignment of error.)

The defendant asked the court, *inter alia*, to charge: "That the letter of the corresponding secretary to S. B. Philson, of the date of April 2, 1892, offered in evidence by the plaintiff, was not an agreement in writing signed by either the president or the secretary, modifying or waiving any of the terms, provisions or requirements of the contract, and was no direction to S. B. Philson to exhibit the policy with assignments attached to W. H. Lambert or the Philadelphia office."

Answer.—"I cannot affirm this point. The letter of Philson was to the New York office of the company, and the reply of the corresponding secretary must be taken to speak for the company and not for himself." (Thirteenth assignment of error.)

Verdict and judgment for the plaintiff. The defendant took this appeal, and assigned error, *inter alia*, as above indicated.

For appellant, *W. J. Baer*.

Contra, Kooser & Kooser and Koontz & Ogle.

Opinion by WILLIAMS, J. Filed January 4, 1897.

The policy sued on in this case was issued by the defendant company upon the life of James Corcoran, and was payable to his wife Frances Corcoran if she survived him, otherwise to their children. The policy was obtained in 1877. James Corcoran died in January, 1894, leaving his wife and three children to survive him. Mrs. Corcoran made proof of her husband's death, and claimed the amount due upon the policy as the payee named therein. She alleged that the policy had been mislaid or lost, and

was required to make such proof of the fact as she was able, and to give a bond of indemnity to the company before the insurance money was paid to her. This she did, and on the thirtieth day of April, 1894, the money was paid to her. On the twenty-fifth day of February, 1895, nearly one year after the payment to Mrs. Corcoran, this action was brought, the plaintiff claiming title to the policy by virtue of an assignment by James and Frances Corcoran to W. H. Dill, made in October, 1890, as collateral security for an indebtedness, and an assignment from Dill to himself on the tenth day of March, 1892, accompanied by an assignment of the indebtedness to secure which the assignment to Dill had been made. The policy stipulated among other things that the company would take no notice of any assignment until it had been furnished with a duplicate, or a certified copy thereof, delivered to the company at its principal office. The defendant set up as a defense to the action the payment to Mrs. Corcoran, and the provision of the policy just referred to. To this the plaintiff replied that the company had waived the stipulation; and upon this question the case went to trial.

As a proof of waiver the plaintiff gave in evidence his own letter to the secretary of the company of March 29, 1892, referring to the assignment by the Corcorans to Dill, and by Dill to himself, and asking whether he should forward the policy to the company to have an approval of the transfer made or should send the assignments only. He followed this with the reply of the secretary, dated on the second of April, 1892, saying that the company had no record of the transfers referred to, but if furnished with duplicate or certified copies of the assignments the company would file them as a notice of claim, and directing him to communicate with the general agent of the company, Mr. W. H. Lambert, of Philadelphia. He then proved that he sent the policy by a messenger to Mr. Lambert, who in Mr. Lambert's absence showed the policy to a clerk, who after looking at it returned it without comment. No copies were in fact sent to either the New York or the Philadelphia office, and the proof was that no note or memorandum of the transfers could be found in either office.

Several of the assignments of error raise the question, on whom did the duty of putting a construction on the letter of the secretary of the company of second April, 1892, rest? The learned judge appears to have submitted the question to the jury. There was no ambiguity about the letter. It was plain and direct in its statements. Its construction was therefore for

the court. It was a fact that might be taken into consideration by the jury that such a letter was written, and its legal effect as declared by the court was to be accepted by them and acted upon, but the construction of the letter, and whether it was a waiver of the stipulation in the policy were questions for the court. Substantially the same thing must be said in regard to the third assignment. What the letter meant was again referred to the jury in the answer to the plaintiff's first point. The court should have told them that the letter authorized the presentation of the copies at the Philadelphia office, and called their attention to the evidence showing what actually transpired when Gardell took the policy and assignments there and exhibited them. If the production of copies for filing was actually waived by the Philadelphia office, then the plaintiff should recover. If it was not, then he must look to Mrs. Corcoran or the person who received the money that belonged to him.

The fourth assignment must also be sustained. The policy was issued to Mrs. Corcoran. If, as appeared at the trial, there had been no such notice of a transfer given at the time the money was paid to her as the policy requires, the fact that she did not produce the policy, but alleged it to be lost, raised no presumption that the policy was held by another. If Mr. Philson then held a valid transfer of the policy to himself, he was advised by the terms of the policy that it was his duty to send copies of the assignments under which he claimed title to the company for filing, and that if this was not done no notice would be taken of information received in any other manner affecting the ownership of the policy. It was his duty to the company no less than to himself, to give notice in the manner provided for. If he did not do this but allowed the proofs of death to be made and the money claimed, and actually paid in good faith to the apparent owner, he is in no position to invoke a presumption such as was held to exist in the answer to his second point.

An additional remark should be made in regard to the thirteenth assignment of error. The complaint in this assignment is that the point to which it refers was not answered at all. The point asked the learned judge to instruct the jury that the letter from the secretary of the defendant company, of April 2, 1892, was not an agreement signed by the president or secretary of the company, waiving or changing any of the terms of the policy, or an instruction to the plaintiff that it would be sufficient notice if he exhibited the policy and assignments to Mr. W. H. Lambert at the Philadelphia office.

This was but another mode of asking the court to expound the letter and not refer it to the jury for exposition. The court replied, "I cannot affirm this point," but added that the letter of the secretary must be taken as speaking not for himself as an individual, but for the company as its officer. This is entirely correct. The trouble is that it misses the question raised by the point, and disposes of another not in controversy. The plaintiff was insisting upon a waiver of the provision in the policy that required copies of assignments to be furnished to the company for filing by it as notice of claim by the assignee, and was asking the court to permit the jury to find proof of such waiver in the letter. The point in substance asked the court not to submit the construction of the letter to the jury, but to instruct them in its meaning and effect. The answer, while amounting to a denial of the point, places that denial upon a ground not raised or involved in any phase of the controversy. We have already said that it was the duty of the court to say what the letter of the secretary meant, and whether it was or was not a waiver of any provision of the policy. If it was not, the evidence upon this question was narrowed down to what took place in Philadelphia. Unless the production of copies was in fact waived by W. H. Lambert or his clerks, in their interview with Gardell, we can see no ground for a recovery by the plaintiff against the company. What other remedy may be within his reach is a question not raised on this record.

The judgment is now reversed and a venire facias de novo awarded.

SMITH'S ESTATE.

Appeal of M. H. STEVENSON.

An executor, about to sell land for the payment of debts under an order from the Orphans' Court, and who was indebted both as executor and in his individual capacity to one who had bought out the heirs, agreed in writing with the said vendee that in case he attended the sale and became the purchaser, the amount of the said indebtedness should be deducted from the purchase money. Held, that in the absence of complaint from heirs, devisees, distributees or creditors, the agreement was valid and enforceable, notwithstanding the sale had been made, returned and confirmed on the usual terms, viz., one-third on confirmation, balance in one and two years, with interest, etc. Costs in this case placed upon the executor.

Appeal of M. H. Stevenson, respondent, from the decree of the Orphans' Court of Washington county, in a petition by George M. Tenan, executor of Stephen Smith, deceased, to rescind the confirmation of a sale of defendant's land

for respondent's failure to pay the first installment of the purchase money, according to the terms of the sale.

Stephen Smith died October 7, 1892, testate. There was about \$1,000 of personalty, an article of agreement for the sale of land on which there was due some \$800, one farm of 73 acres and another of 154 acres. The general indebtedness amounted to \$2,200; there was a judgment of \$800 and a mortgage on the 154-acre farm of \$3,400. George M. Tenan took out letters testamentary October 24, 1892, and, without authority in the will or from the heirs, took possession of the farms and had collected the rents for two years. At No. 1 February Term, 1893, he procured an order to sell the farms for payment of debts at either public or private sale.

In June, 1894, the executor and his brother, J. B. Tenan, bought one-half of the mortgage, and one Robert Scott, a friend of the executor, bought the other one-half and the \$800 judgment. The assignment of the mortgage, however, was taken in the names of J. B. Tenan and Robert Scott, the executor's name being omitted, and was never recorded.

In the meantime M. H. Stevenson had bought out two of the four heirs, giving him an half interest in the estate. In December, 1894, the executor, without notice to the heirs, creditors, or to Stevenson, sold the 73-acre farm privately to Scott and had the sale confirmed. On April 1, 1895, Scott was given possession, but while his judgment and half mortgage were drawing interest he was paying no interest on the purchase money. On learning this Stevenson insisted that the executor should at once off-set the purchase money (\$3,300) against Scott's securities to stop interest. This was done by a paper known as "Exhibit C."

In May, 1895, Stevenson, suspecting collusion between Scott and the executor, insisted on settling with the latter and having him withdraw from the estate. Stevenson had paid some debts direct to creditors. An account was taken of all moneys which the executor had collected in, including the rents, he was credited with all debts which he had paid and there was due him a balance of \$802.96 which Stevenson paid, and thereupon the executor assigned over to Stevenson all the accounts in his hands and which he had paid, including the \$800 judgment, which the executor had taken from Scott as part of the purchase money of the 73-acre farm. This paper was known as "Exhibit B." About the same time, Stevenson having bought out the other two heirs, took possession of the 154-acre farm. The executor had his order for the sale of the farm renewed from time to time

and finally fixed August 9, 1895, as the day of sale. Fearing that the farm would not sell, the executor, on July 30, 1895, made with Stevenson the following agreement, which was written on the lower end of "Exhibit B:":

And now, July 30, 1895, it is agreed by the undersigned as follows: That if, at the sale of the Home Farm, on August 9th next, the said Stevenson shall become the purchaser of the whole or a part of said farm, the amount of the above accounts by me assigned to said Stevenson May 8, '96, as well as the accts. against said estate heretofore paid by said Stevenson, shall be deducted from the amount of the purchase money, and that, upon said Stevenson's receipting the said accts. and assigning them over to said Tenan, along with the vouchers, etc., and the payment in cash or mt'g of the balance of the purchase money (if any remains due), that thereupon the said Stevenson shall be entitled to a deed.

At the sale, on August 9th, Stevenson inquired of the executor whether the land was to be sold subject to, or to be discharged from, the \$3400 mortgage. The executor replied, "The mortgage is paid and will be satisfied without trouble to the purchaser." To this his brother and Robert Scott nodded their assent. Stevenson became the purchaser at \$35 per acre. The terms of sale as stated in the order of sale were: One-third on confirmation, balance in one and two years with interest. The sale was so returned and confirmed by the court. The agreement between the executor and purchaser was not referred to in the return or in any way brought to the court's attention.

Subsequently the executor refused to have the \$3400 mortgage satisfied or to allow the credits mentioned in the agreement and asked the court to set aside the confirmation on Stevenson's refusal to pay the one-third in cash, as per terms stated in order of sale and return.

The court below allowed Stevenson credit on the purchase money with the amount he had paid direct to creditors (\$409) and with the amount he had paid to the executor in cash (\$302), but refused the rest and made a decree that Stevenson pay the balance of the first installment (\$587) in cash and give bond and mortgage for the second and third. The court made no decree as to the mortgage of \$3400, and ordered the costs to be paid out of the estate. Thereupon Stevenson appealed, assigning for error (1) the court's refusal to recognize and enforce the agreement of July 30, 1895.

(2) The court's neglect to order that the executor satisfy the \$3400 mortgage.

(3) Ordering costs to be paid by estate instead of by George M. Tenan, executor.

For appellant, *J. C. Ewing* and *M. H. Stevenson*.

Contra, H. M. Dougan.

Opinion by MITCHELL, J. Filed January 4, 1897.

This case illustrates very forcibly the dangers of short cuts out of the regular course of administration of estates, which, as the learned judge below well remarked, "not infrequently prove more expensive than to follow the procedure established by law." He was clearly right in getting the estate back to the orderly and regular course of administration, and therefore in refusing to rescind the confirmation of the sale. But the decree was made unduly burdensome to the appellant by insistence on the formal terms of sale, and failure to recognize fully the agreement between appellant and the executor upon the basis of which the former made the purchase.

The situation was anomalous. The decedent died in 1892, and at the end of four years the estate was not only unsettled, but the executor did not seem to know—certainly has not shown—what its real condition was. On the contrary, his management exhibits great irregularity. He has intermeddled with the real estate, and collected rents, etc., from it, for which he has not accounted. The charge that he permitted debts of the estate bearing interest to run on, while available assets to pay them remained, without effort to collect and apply them, appears to be backed by substantial evidence; and his apparent settlement with Scott, the purchaser of the 78-acre farm, as shown in the memorandum of May 15, 1895 (called "Exhibit C"), allows Scott interest on his half of the mortgage, but charges him no interest on the unpaid purchase money. All these matters may be susceptible of full and satisfactory explanation, but it should be given as the first step towards the proper extrication of the estate out of its present disorderly condition.

Prior to the sale, in August, 1895, the appellant had become interested in the estate by purchase of the shares of the heirs, and in order to hasten the relief of the land from the decedent's debts, which were a charge upon it, he had paid some of them himself, and had made a partial settlement with the executor, as shown by the memorandum of May 8, 1895 (Exhibit B). In this situation of affairs, the sale of the home farm came on to be made, and on July 30, 1895, appellant and the executor entered into an agreement which is the substantial basis on which this controversy turns. By it, if appellant should become the purchaser, the accounts assigned to him by the executor in the memorandum of May 8, 1895, "as well as the accounts against said estate heretofore paid by said Stevenson, shall be deducted from the amount of

the purchase money," etc. The learned judge below was of opinion that this was a private arrangement between the executor and the purchaser, which the court could not recognize after the confirmation of the sale upon its expressed terms, and also that the rents or other moneys collected by the executor from the real estate could not be considered in this proceeding. In the regular and orderly course of administration, he would, undoubtedly, be right; but this proceeding was not in the regular and orderly course. Appellant, as assignee of the heirs, had a claim against the executor for rents, etc.; and he was also a creditor of the estate, by subrogation to the claims against it which he had paid. If the executor had settled with appellant before the sale, there could be no question of his right to do so, although the claims were partly against him as an individual, and partly in his capacity as executor. But the parties chose to postpone the settlement until after the sale, and then to settle the balance on whichever side it should appear. If fairly and honestly done, there was nothing unlawful in this; and it does not appear that any one is injured by it. It is not shown that there are any debts of the estate, except, possibly, a balance on the mortgage, which will be referred to later; nor that, if there are any such debts, the executor has not funds in his hands to pay them. There is no one before the court complaining either as heir, devisee, distributee, or creditor. So far as appears, the only matters to be adjusted are the items of the account between the executor and the appellant in his threefold relation of assignee of the heirs, creditor of the estate, and purchaser at the sale. The executor mingled all these items in the agreement of July 30, 1895, and on the basis of that agreement appellant became the purchaser. Equity requires that as a first step, before any payment is demanded from him, it should be shown that there is a balance on that account against him. The executor should be required to state a full account of all his dealings with the estate, real and personal, and of all outstanding debts, etc. The court will then have before it the information necessary to make a final settlement of the whole matter.

One matter left in especially unsatisfactory shape is the mortgage to the New York Mutual Life Insurance Company. Scott claims to be the owner by assignment of one-half, and the executor and his brother owners of the other half; but the assignment has not been put on record, nor, so far as appears, has it even been produced on call and on proper occasion. This appears not only from the testimony of appellant, but also of Mr. McCracken, who repre-

sented parties willing to make a loan on the property if the title could be relieved from the lien of this mortgage. It is the duty of the executor, before calling on the appellant for payment of the purchase money, to clear up the apparent mystery surrounding this mortgage. Appellant claims that the present owners are estopped by their declaration at the sale that the mortgage was paid and would be satisfied, though we have not found any adequate explanation, if this was so, why appellant agreed to recognize the mortgage as an existing encumbrance in the memorandum of May 15, 1895. But in any case the executor owes the appellant, as purchaser of the property, the duty of having the mortgage satisfied if paid, or, if not, of having the assignments put of record, and the balance due definitely ascertained.

So much of the decree as refuses to rescind the confirmation of the sale is affirmed; but the rest of the decree is reversed, and it is ordered that no payment be required from appellant, until it shall appear by the executor's account, made up in accordance with this opinion, that a balance is due by appellant; costs of this appeal to be paid by the executor, appellee, but without prejudice to his right to be repaid out of the moneys of the estate, if upon final hearing and decree such repayment shall appear to be just and equitable.

AUBERLE v. CITY OF MCKEESPORT.

In an action to recover for personal injuries where the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible.

Plaintiff was driving her cow along a public road at night time, the evidence showing that she could see a reasonable distance. While crossing a bridge which was the width of the street and upon which there were no guard-rails she fell over the side and was injured. The evidence showed that plaintiff had a long acquaintance with the locality, and though she testified she had never crossed it since it was rebuilt, she had lived within eight hundred feet of it for many years. *Held*, guilty of contributory negligence, and could not recover.

Appeal of the City of McKeesport, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of trespass brought by Pauline Auberle to recover for personal injuries caused by defendant's negligence in failing to put a railing on a bridge off which plaintiff fell while walking over the same in the nighttime.

The only assignments of error was the question of the plaintiff's contributory negligence

and the admission of the opinion of witnesses as to whether the bridge at the time of the accident was a dangerous one.

The facts are stated in the opinion of the Supreme Court, *infra*.

For appellant, *W. B. Rodgers and T. C. Jones*.

Contra, F. H. Guffey and J. M. Stoner.

Opinion by MITCHELL, J. Filed January 4, 1897.

The learned judge, manifestly against his own judgment, admitted the opinions of witnesses that the bridge where the accident took place was dangerous. The facts were not in dispute on this point; the bridge was the full width of the roadway, thirty-three feet; it was only from fifteen to eighteen feet long, and four or five feet above the bed of the run. The situation was capable of full and exact description, and whether the absence of a guard-rail under such circumstances made the bridge dangerous for ordinary travel was a matter on which every juror was as competent to form a sound individual judgment as any of the witnesses. The admission of opinions of the latter was therefore error.

The rule on this subject is that where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. But where the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible. The rule in this form was settled by *Graham v. Penn'a Co.*, 129 Pa. 149, and has not been departed from. Whether its application to existing facts in subsequent cases has always been correct, is a matter on which opinions may naturally differ, because, as was said in that case, quoting Chief Justice SHAW in *N. E. Glass Co. v. Lovell*, 7 Cush. 821, "there is extreme difficulty in laying down any rule precise enough for practical application, and the only proper course is to keep the principle steadily in view, and apply it according to the circumstances of each case."

The learned judge below considered the principle as modified by some of the later cases, and therefore, as already said, against his own opinion, admitted the evidence. In so doing however he gave the cases too broad an effect. They were not intended to introduce any modification

of the rule in *Graham v. Penn. Co.* In *McNerney v. Reading City*, 150 Pa. 611 (the case principally relied on at the trial), the objection made was not to the nature of the evidence but to the qualifications of the witness as an expert. Our Brother MCCOLLUM, after referring to this fact, cited *Graham v. Penn'a Co.*, and quoted as applicable to the case in hand, what is there said of *Beatty v. Gilmore*, 16 Pa. 463, that it was "not clear that the mere description of the place would convey to the jury an adequate idea of it with reference to the danger." Whether the application of the rule in *McNerney v. Reading* was sound, or whether the letter of the ruling in *Beatty v. Gilmore* was not followed rather than the principle of *Graham v. Penn'a Co.*, may admit of serious question. The case is on, if not across the border line, but it was not intended to make any departure from the settled rule.

In the other case referred to by the learned court below, *Kraut v. Railway Co.*, 160 Pa. 327, the point was not discussed in the opinion, and the condition of the street upon which the witness' opinion was given, whether there was a hole, or only loose cobble stones, or both, was in dispute and left by the evidence very uncertain. So, in *Kitchen v. Union Township*, 171 Pa. 145, the circumstances were unusual and complicated, and were thought to bring the case within the rule admitting the witness's opinion, but no departure from the rule itself was intended or indicated. On the other hand, in *Dooner v. Canal Co.*, 164 Pa. 17, it was held that whether the absence of a bar or "grab-iron" on a freight car made it defective was a matter for the judgment of a man of ordinary intelligence and observation, and not therefore for a witness' opinion, citing and affirming the rule in *Graham v. Penn'a Co.*

There remains the serious question of negligence on the part of defendant and of plaintiff. The bridge in question was not in the built-up portion of the borough, but in a rural district close to the township line. It was the full width of the road thirty-three feet, seventeen feet in length by the city surveyor's measurement, and five feet above the bottom of the run. The only complaint made of it is the absence of a hand rail, or guard on the outside. As said by the learned judge below, it is difficult to see how any sober person exercising reasonable care would be likely to walk off such a bridge. Under such circumstances there was no sufficient evidence of negligence on the part of the borough to submit to the jury. It is a much weaker case than *Monongahela City v. Fischer*, 111 Pa. 9. The plaintiff was clearly guilty of contribu-

tory negligence. About 9 o'clock at night she started out without a lantern to hunt her cow which had broken loose and got away. She proceeded over rough roads, and through an unfenced alley across farm lands, found her cow, and in driving it home, came to this bridge. She testified that she was not acquainted with it since the rebuilding, some months or a year before, a statement as the learned judge says, not only inherently improbable, but negatived by the positive testimony of other witnesses who had seen her cross it. But assuming it to be true, she had lived since 1861 within eight hundred feet of the place, and the testimony is undisputed that the two previous bridges at that point had been only about half the width of the roadway. She had therefore a long acquaintance with the locality when it was less safe than at the time of this occurrence. It was a moonless night, but could not have been very dark, as she was able to follow and find the cow, and no witness on either side indicates any difficulty in seeing a reasonable distance. There were electric lights belonging to the passenger railway in the neighborhood, but the exact position and effect of them were disputed. Coming now to the moment of the accident the plaintiff, who was the only witness, testified that she saw a big man coming, and the cow, then about one hundred feet ahead, "walk sideways. I noticed a cow with her bell walking sideways to the left and so I thought, Oh, well, I am not going to walk on top of this man, and I walked sideways too, and the first thing I knowed my foot had no hold and I fell," and on cross-examination, she said that she stepped aside to avoid "walking on the top of the man" while he was still between two and three hundred feet away. Thus with light enough to see a man at that distance, and to notice the action of the cow in turning aside, she, that far in advance of meeting the man, and without looking where she was going, stepped clear out of the roadway of thirty-three feet and over the side of the bridge. It is impossible to permit a jury to say that that was exercising reasonable care.

Judgment reversed.

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

REED v. PALMER.

In an action of *assumpsit* before an alderman against one who has given bail absolute for the payment upon appeal for the judgment, debt, interest and costs recovered against the defendant in the judgment who

failed to perfect his appeal, the bail cannot set up the defense that the defendant in the judgment was not indebted to the plaintiff; the judgment remaining unreversed.

Neither can the bail defend on the ground that the alderman failed to adjudge that it was for manual labor if this appear in the record of the alderman, though not repeated in the judgment.

The Act of April 9, 1872, relating to the taking of bail in cases for manual labor, is not repealed by the Act of April 20, 1876, relating to the same subject.

In such a case the bail cannot claim there has been no adjudication of the case because the appeal was not entered in court if the recognizance was given under the Act of April 9, 1872. The Act of April 1, 1873, providing that where an appeal is taken from the judgment of a justice or alderman, and the appellant neglects or refuses to file his appeal, the justice may issue execution against the defendant or proceed against the bail.

An execution against the defendant in the judgment does not affect the right of the plaintiff to proceed against the bail.

No. 93 Dec. T., 1896. Rule for judgment.

Opinion by SLAGLE, J. Filed February 10, 1897.

This is an appeal from the judgment of Alderman Gripp. The statement and transcript show that an action had been brought by Edward N. Reed against one Andrew A. Bott to recover for wages of manual labor, and judgment entered in favor of plaintiff on the 27th day of January, 1893, for \$220.50. On the 13th day of February, 1893, the defendant appealed, and J. C. Palmer, the defendant in this case, entered into a recognizance as follows:

"February 13, 1893, J. C. Palmer become bail absolute in this case in the sum of four hundred and fifty dollars, conditioned for the payment of amount of judgment, debt, interest and costs in case this judgment shall be affirmed on the amount that may be legally recovered against the appellant."

This appeal was not entered in court.

July 30, 1896, a certificate of no appeal was filed with the alderman, and on August 4, 1896, an execution was issued and returned "no goods." August 19, 1896, a summons in *assumpsit* was issued by Alderman Gripp against the defendant, J. C. Palmer, upon his recognizance. He was served but did not appear, and judgment was entered against him August 28, 1896, for \$287.90 and costs. From which judgment this appeal was taken.

The affidavit of defense is in substance as follows:

1. That Andrew A. Bott was not indebted to plaintiff in the sum of \$220.50.
2. He admits the proceedings before the alderman, but alleges that the alderman did adjudge that it was for the wages of manual labor, and

therefore the recognizance of bail absolute was void.

3. That he intended to give bail required by section 1 of the Act of April 20, 1876, to wit: Bail "for the debt and costs to be paid when finally adjudged to be due the plaintiff by the court."

4. That under the recognizance entered into, the appeal not having been entered, there had been no adjudication by any court and therefore no breach of the undertaking has occurred.

5. That having issued an execution against defendant he cannot proceed against the bail.

6. That the action should have been by *scire facias* and not in *assumpsit*.

The first defense is clearly insufficient. The liability of Bott to the plaintiff cannot be tried in this case, in view of the fact that there is a judgment against him unreversed and which is not alleged to be paid.

The record of the alderman in the case of *Reed v. Rott* shows that the claim was "for wages of manual labor," and though this is not repeated in the judgment, the fact clearly appears in the record and justifies the taking of bail provided by the act.

There are two Acts of Assembly relating to suits for wages,—April 9, 1872, § 5, Purd. Dig. 2073, pl. 4, and April 20, 1876, Purd. Dig. 2074, pl. 5. The first provides for bail "conditioned for the payment of the amount of the debt, interest and costs that shall be legally recovered in such case against the appellant." The second, "for the payment of the debt and costs to be paid when finally adjudged to be due the plaintiff by the court."

The defendant says he intended to enter bail under the latter act. But he did not do so. The bail was intended to be taken under the Act of April 9, 1872. This act was not repealed by the Act of April 20, 1876. There is no repealing clause in that act and the two are not inconsistent. The latter was unnecessary, but the two can stand together.

The recognizance in this case does not follow the Act of Assembly exactly, but it is substantially in accordance with it, and it should therefore be sustained. In such matters the law looks to the substance rather than to form: *Seidenstriker v. Buffum*, 14 Pa. 158; *Murray v. Hazlett*, 19 Id. 356; *Ingham v. Tracey*, 5 Watts, 583.

But it is contended that as the appeal was not entered in court there has been no adjudication of the case, and that this is necessary to fix the liability of the bail. There is some plausible ground for this contention in cases of bail entered under the Acts of April 20, 1876, and

March 15, 1847, Purd. Dig. 1140, pl. 96, which prescribe conditions which refer to a judgment of the court. It was so held by Judge FURST in *Shivery v. Grauer*, 12 Pa. C. C. R. 471. But the same reasoning does not apply to a recognizance under the Act of April 9, 1872.

The amount of the judgment may properly be said to be legally recovered when the judgment of the magistrate becomes absolute by the failure to file the appeal.

But we are inclined to give a greater effect to the Act of April 1, 1823, § 5, Purd. Dig. 1141, pl. 5: "In all cases where an appeal is taken from the judgment of a justice of the peace or alderman, and the appellant neglects or refuses to file the same in the prothonotary's office of the proper county according to law, it shall and may be lawful for the justice or alderman, before whom the judgment was entered, to issue an execution for the amount thereof at the instance and request of the appellee, or proceed by *scire facias* against the bail." This act is plain in its terms and applies to all cases of appeal without regard to the terms of the recognizance; and every person becoming bound for an appeal must understand that this act provides one of the conditions of the recognizance without regard to whatever other provisions it may contain. If this were not so, a defendant could obtain a stay of execution for three months without imposing any obligation on the person who obtained it for him.

The fifth objection is that having issued an execution against the defendant the plaintiff has waived his remedy against the bail. If this is true he would be punished for doing a favor to the bail. It is true, that by a strict grammatical construction of the language used the words imply an alternative. The other side of the alternative would also be true that if plaintiff elected to sue the bail he would waive his right to an execution against the defendant. Surely the Legislature never intended such an effect. In the construction of statutes grammar always gives way to common sense.

As to the sixth objection it is sufficient to say that an appeal from a magistrate the name of the action is not material if it appear that he had jurisdiction of the cause of action.

For plaintiff, *J. R. Henderson*.

For defendant, *James C. Boyce*.

BALDWIN, for use, v. RALSTON.

A. and B. gave a mortgage to C. to secure a loan to B., A. being surety. D. afterward obtains a judgment against B. and levies on his interest in the land and buys it in. C. releases A. from the mortgage and issues a *scire facias* against B. with D. as *terre-tenant*. *Held*,

that these facts disclose no defense on behalf of D. to the suit.

A court of equity will not require a creditor to proceed against a surety before proceeding against the real debtor in order to protect subsequent creditors.

No. 411 Sept. T., 1894. Motion for new trial and arrest of judgment.

Opinion by SLAGLE, J. Filed January 30, 1897.

The action in this case was a *scire facias* on a mortgage. The mortgage was made by Joseph A. Ralston, Susan Ralston (widow), and Benjamin A. Beam and Agnes H. Beam (his wife), upon property owned by them as tenants in common, dated September 4, 1893. It contained a clause for *scire facias* upon thirty days' default in payment of interest. April 9, 1894, Baldwin assigned the mortgage to George Cochran, who, on April 12, 1894, released from its lien the interest of all the parties, except Joseph A. Ralston. On July 3, 1894, the *scire facias* in this case was issued, the *præcipe* excepting the released interests and directing notice to A. M. Wilson, *terre-tenant*.

To this A. M. Wilson made defense that, on May 7, 1894, he had tendered to George Cochran the interest then due, which he refused to accept, but does not deny the fact that, under the terms of the mortgage, the whole amount had then become due. For further defense, he says that, on January 3, 1894, he obtained judgment against Joseph A. Ralston, who owned the undivided one-half of the mortgaged premises, for the sum of \$918.45; that, on April 4, 1894, he issued an execution thereon, and on May 7, 1894, purchased the interest of Joseph A. Ralston, and, reciting the assignment to Cochran and the release by him, alleges that the same were in fraud of his right as a judgment creditor.

Upon the trial of the case, the record of these proceedings was offered in evidence, and it was further shown that Susan Ralston and Agnes Hannah Beam had executed the mortgage as sureties for Joseph A. Ralston. The facts of the case were undisputed, and the court instructed the jury that they should find for the plaintiff.

A simple statement of the facts clearly justifies the conclusion of the court. It would be manifestly inequitable and unjust to compel the creditor to make his money from the sureties to enable another, who is creditor of the principal, to realize his claim. On the contrary, courts of equity have always protected the surety when by so doing they did not infringe upon a superior right of another. They have therefore invariably held that a surety who has paid the debt for which he is bound is entitled to be subrogated to all the rights of the creditor against the principal (Blsp. Eq., § 335, etc.), and this is

so well established that the rights of a surety are protected against the claims of other creditors in the matter of marshalling assets: Blsp. Eq., § 342. And though a creditor is not bound to resort to the property of his principal debtor before attacking that of the surety, as he would as against a guarantor, there may be circumstances in which a court of equity would compel him to do so. But as a surety ordinarily has sufficient protection in the right of subrogation, it would be necessary to show that by some cause for which he is not responsible this right would not be efficient; but in case of the sale of the property of both principal and surety, upon distribution, the court would protect the rights of the surety by requiring the creditor to first exhaust the fund arising from the sale of the property of the principal: Blsp. 342. That the right of a surety is good against the claim of a subsequent creditor of the principal needs no argument. To subrogate him to the rights of the creditor in a judgment against the principal would be futile if it could be rendered useless by the principal confessing judgment to another, who thereby gained a preference. This is not the law: *Cottrell's Appeal*, 23 Pa. 294; *Sheldie v. Weishlee*, 16 Id. 184.

It is clear therefore that if the sureties in this case had paid the debt to Baldwin or to his assignee, Cochran, they would have had the right to proceed against the principal, Ralston, and to have sold his interest in the land in satisfaction of his debt, and that Wilson would have had no right to complain, because his rights were no greater than those of Ralston. Ordinarily, upon the payment of a debt by a surety, the security held by the creditor is assigned to the surety, and upon his refusal so to do, he might be compelled to make an assignment. But this is not necessary. "Upon payment of a judgment, he succeeds, by operation of law, to the rights of the creditor:" *Wright v. G. & B. S. M. Co.*, 82 Pa. 80; *Cochran v. Sheldie*, 2 Grant, 437.

The obligation of the surety is for the benefit of the creditor and belongs to him. Even if he may not be compelled to proceed against the principal, he may do so, or he may, if he chooses, relinquish his claim against the surety without prejudice to the rights of the principal or his creditors. That was what was done in this case, and in view of the rights secured to the surety, as above set forth, we cannot see that any injury accrued to Ralston or his creditor, Wilson.

A new trial will therefore be refused.

For plaintiff, James F. Robb and George W. Guthrie.

For A. M. Wilson, *terre-tenant*, A. J. Barton.

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No. 36.

PITTSBURGH, PA., MARCH 31, 1897.

Supreme Court, Penn'a.**McCALLUM et al. v. MORRIS et al.**

A garnishee's answer is not to be construed with the same strictness as an affidavit of defense, and judgment cannot be entered against the garnishee unless he expressly or impliedly admits indebtedness to the judgment debtor.

Appeal of Samuel Lockhart, garnishee, from the decree of the Court of Common Pleas No. 2, of Allegheny county, entered March 31, 1896, making absolute a rule for judgment against him upon his answers to interrogatories, filed in the case of W. H. McCallum and Ewing McCallum, trading as McCallum & McCallum, v. W. W. Morris et al., trading as Morris Brothers & Grey. Also from a decree in the same case, dated April 4, 1896, entering judgment against Samuel Lockhart, garnishee, in the sum of \$1500 upon his answers to the interrogatories filed in the case; and from the decree of date June 11, 1896, allowing the plaintiff to issue execution against the garnishee, upon the judgment of April 4, 1896.

The plaintiffs, having obtained a judgment against the defendants, on September 19, 1895, issued an execution attachment against Samuel Lockhart, and summoned him as garnishee. On November 4, 1895, the interrogatories were filed, and in his answers the garnishee denied the right of plaintiffs to inquire into his dealings in relation to real estate with W. W. Morris, one of the defendants, and denied that he owed Morris Bros. & Grey anything. He admitted, however, that he had had dealings with the defendant firm, Morris Bros. & Grey, and alleged that he had paid his indebtedness to them in full before the service of the attachment upon him, but not setting forth the facts in reference to said dealings. Subsequently additional answers were filed, in which the garnishee admitted that he had purchased from W. W. Morris a property for \$10,500 and alleged that he paid for it by assuming a mortgage of \$6500 against the property and paid cash prior to July 1, 1895, \$2500, and gave a note to W. W. Morris prior to July 1, for \$1500 and averred further that the said note for \$1500 was dated May, 1895, and payable in two years from its

date, and was sold and delivered by the said W. W. Morris to a third person, who was an innocent holder for value without notice of the attachment proceedings, and that affiant agreed with the present holder to secure to him payment of the said note, subject to settlement of any accounts, claims, equities or rights growing out of the dealings between the garnishee and the said present holder of the note.

Additional answers were filed later, in which garnishee refused to state to whom said note had been sold, although he stated that it had been sold on or about June 18, 1895. Upon the answers filed the court entered judgment against the garnishee in the sum of fifteen hundred dollars, whereupon this appeal was taken, the following errors being assigned:

"*First.*—The court erred in sustaining the attachment and making the order and decree of November 16, 1895, viz: 'And now to wit, this cause come on to be heard, and it is ordered and decreed that Samuel Lockhart, the garnishee, make full, true and correct answers as to his indebtedness and dealings with each member of the defendant firm, and give full and true particulars in reference to the real estate transaction with W. W. Morris, on or before Saturday, November 23, 1895, at 10 A. M.'

"*Second.*—The court erred in entering the order of March 31, 1896, viz: 'March 31, 1896, rule of November 7, '95, against Samuel Lockhart, made absolute; no execution to issue without the order of court.'

"*Third.*—The court erred in making and entering the order and decree of April 4, 1896, viz: 'And now, April 4, 1896, on motion of Galen C. Hartman, attorney for the plaintiffs, judgment is entered in favor of William H. McCallum and Ewing McCallum, trading as McCallum & McCallum, against the garnishee, Samuel Lockhart, in default of sufficient answers to plaintiffs' interrogatories and compliance with the order of court, for the sum of fifteen hundred dollars, which sum the said garnishee is indebted to said William W. Morris, defendant, and has in his hands, and that the plaintiffs have execution for said judgment against the said garnishee with interest and costs, and if the said garnishee refuse or neglect on demand by the sheriff to pay the same, then the same to be levied of the said garnishee, his goods and lands according to law, and that the said garnishee, Samuel Lockhart, be thereon discharged as against the said William W. Morris for the sum so attached and levied of the debt in his hands. No execution to be issued upon this judgment until the further order of the court.'

"*Fourth.*—The court erred in entering the order and decree of June 11, 1896, viz: 'May 27, 1896, rule granted on Samuel Lockhart, garnishee, to show cause why execution should not be allowed and issued against him returnable *sec. reg.* June 11, argued and rule absolute.'" "

For appellant, *D. B. Maxwell.*

Contra, *Galen C. Hartman.*

Opinion by STERRETT, C. J. Filed January 4, 1897.

The entry of judgment in this case against the garnishee was clearly erroneous. His answer gave in detail the circumstances which led up to the transfer of the note to a *bona fide* purchaser for value; and was sufficiently full and explicit to raise an issue which a jury alone could decide: *Bank v. Gross*, 50 Pa. 224. True he did not give the name of the transferee; but that was a fact which the interrogatories did not specifically require, and which, in that state of the proceedings, it was not essential to give. Whether he gave or withheld it would not change the issue of indebtedness. Substantial denial of indebtedness gave the proceeding a preliminary character. A garnishee's answer is not to be construed with the same strictness as an affidavit of defense. He is not bound to set forth specifically and at length the nature and character of his defense to the attachment, but such facts only as are material to the admission, or denial of indebtedness, to the defendant. If his counsel advise, or he himself thinks, a question is improper, he is entitled to instruction by the court: *Wood v. Wall*, 24 Wis. 647. He is not bound to submit to every conceivable question under penalty of paying the whole debt. For insufficient answer the plaintiff may except or demur: T. & H. Prac., sec. 1202. But judgment cannot be entered against the garnishee unless he expressly or impliedly admits his indebtedness, or his possession of assets belonging to the judgment debtor: *Bank v. Meyer*, 59 Pa. 361. There must be a distinct admission of liability such as leaves no doubt: T. & H. Prac., sec. 1202. The admission of indebtedness, like a special verdict, forms the exclusive foundation of the judgment. If the facts stated appear to be insufficient to entitle plaintiff to judgment, the court should refuse it, and discharge the rule, leaving the plaintiff at liberty to rule the garnishee to plead the issue and go to trial: *Bank v. Gross*, *supra*.

The answer here was plainly sufficient to raise the issue of the garnishee's indebtedness. He had made a distinct and unequivocal denial. How his debtor relations had become

changed might become an appropriate subject of inquiry at the trial, as affecting the question of credibility; but was obviously immaterial at this preliminary stage of the proceeding whose purpose was to evoke an admission, or denial, of indebtedness to the judgment debtor. The rule for judgment against the garnishee should have been discharged.

Judgment reversed, rule for judgment discharged and all proceedings thereunder set aside at plaintiffs' costs.

CHAFFEY v. BOGGS.

Where the defense to a *scire facias* on a purchase money mortgage is that one claiming paramount title to that of the mortgagee has taken possession of part of the land in question, an affidavit of defense is sufficient which merely avers that another "claims that the title to a portion of said lot or piece of ground is in the said claimant" and "not in the grantee of the defendant." An action of ejectment instituted by a mortgagor in a purchase money mortgage against one claiming under a paramount title to the mortgagee's, who has taken possession of the mortgaged premises, does not estop the mortgagor from setting up the ouster as a defense in proceedings on the mortgage.

Appeals of S. L. Boggs, and of the Boggs-Jones Company, Limited, defendants, the latter of whom intervened by leave of court *pro interesse suo*, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in making absolute a rule for judgment for want of a sufficient affidavit of defense in proceedings on a *scire facias sur mortgage*, wherein W. T. Chaffey was plaintiff.

S. L. Boggs executed a mortgage to W. T. Chaffey, which was dated June 1, 1892, duly acknowledged and recorded. The mortgage was given to secure an unpaid balance of purchase money. A *scire facias* on the mortgage issued to the first Monday of October, 1895; to this an affidavit of defense was filed, setting forth, *inter alia*:

"That on the 16th day of September, 1896, the Pennsylvania Railroad Company, lessee of the Western Pennsylvania Railroad Company, broke down the fence along the line of the said property, adjoining the right of way of the said railroad company, and evicted the defendant's grantee, hereinafter mentioned, therefrom, and took forcible possession of a portion of the above described lot or piece of ground, and has held possession of the same ever since. That the said railroad companies claim that the title to a portion of said lot or piece of ground is in the said railroad companies, and not in the grantee of the defendant. That the strip of ground so claimed by the said railroad companies is about twenty feet in width at the north westerly corner

of the tract conveyed by plaintiff to defendant, and extends westwardly, parallel with the said railroad, preserving the same width, for about one hundred feet, and extending a further distance of about ninety-five feet, tapering to a point, and embraces, as nearly as affiant can ascertain, about 3,000 superficial feet, and extending across the entire front of said property on the northerly side thereof."

The affidavit further alleged that an action of ejectment had been brought against the railroad company by the grantees of the defendant in the *sut. fa.* the Boggs-Jones Co., Limited, who, by petition, had been admitted as defendant in the *acire facias, pro interesse suo*. A supplemental affidavit of defense set forth, *inter alia*:

"That the title under which said railroad companies now hold possession of said portion of said tract of ground conveyed by the plaintiff to the defendant as aforesaid, is paramount to the title formerly held by the plaintiff, and which he undertook to convey by said deed to the defendant." And that the subsequent purchaser from the appellant, having sued the railroad company in another court, in an action of trespass, the railroad company had filed a bill of particulars, setting out its title at length, a copy of which bill of particulars this appellant attached as a part of his affidavit of defense.

A rule was entered for judgment for want of a sufficient affidavit of defense, which, upon argument, was made absolute. The defendant appealed, the action of the court being assigned as error.

For appellant, *William Yost*.

Contra, W. A. Challenger and Clarence Burleigh.

Opinion by McCOLLUM, J. Filed January 4, 1897.

This is an appeal from a judgment for want of a sufficient affidavit of defense. The judgment was entered in a suit upon a mortgage on land sold and conveyed by the mortgagee to the mortgagor with a warranty of title. The mortgage was given for the balance of the purchase money. The mortgagee is the plaintiff in the suit and the mortgagor and his grantee are the defendants in it. The question presented by the appeal is whether the affidavits filed by the mortgagor were sufficient to prevent judgment. The affidavits may and should be considered together. It is distinctly averred in them that the Pennsylvania Railroad Company, lessee of the Western Pennsylvania Railroad Company, has taken and now holds possession of a valuable part of said land under a title paramount to the title formerly held by

the mortgagee and which he undertook to convey by his deed to the mortgagor. It is also averred by the mortgagor that he did not know of the claim of the railroad company to a part of said land until about the time his grantee was ousted therefrom, and that, "as at present advised and informed as he believes and expects to be able to prove on the trial of this cause, the averments hereinbefore contained are true." It seems to us that these averments were sufficient to prevent judgment. The suit brought against the railroad company by the grantee of the mortgagor is not a bar to the defense presented by the affidavits, nor an impairment or qualification of it. The discovery of the existence of a paramount title in the railroad company appears to have been subsequent to the institution of that suit. The rule for judgment specified but one defect in the original affidavit of defense, and that was that it did not sufficiently allege the existence of a paramount title in the railroad company. The rule was taken before the supplemental affidavit was filed and this contained a plain averment which supplied the alleged defect in the first. The only specification of any defect in either affidavit was the one we have referred to. The single question, therefore, to which the attention of the court was directed was whether the existence of paramount title in the railroad company was averred. As already indicated, we think the court erred in holding that it was not. Briefly stated, the defense interposed by the mortgagor is that the railroad company has taken and now holds possession under paramount title of the most valuable part of the land the mortgagee sold, and by his deed undertook to convey to him. The averments in the affidavit sufficiently disclosed this defense, and he should be allowed an opportunity to establish it by evidence.

Judgment reversed and procedendo awarded.

W. T. CHAFFEY v. S. L. BOGGS, Appellant.

Opinion by McCOLLUM, J. Filed January 4, 1897.

This appeal was argued with No. 24, October Term, 1896 [*Chaffey v. Boggs, ante*, p. 341], and for the reasons stated in the opinion filed in that appeal, the judgment is reversed and a *procedendo* awarded in this.

SMITH v. WACHOB et al.

A petition to open a judgment and let the defendant into a defense is irregular when the record shows that there has been a previous trial to determine the validity of a judgment resulting in a verdict against the petitioner, and upon which verdict judgment has not been entered.

A petition to open a judgment entered upon a judgment note set forth as a reason that there was no consideration for the note. An issue had been previously granted and tried twice to determine whether the petitioner had signed the note or not which was determined adversely to him, and he now alleged that it developed at the first trial that there was no consideration. Held, that as he had not taken advantage of that defense at the second trial, it being known to him then, he could not now assert it as a new ground of defense.

Appeal of J. M. Hine from the judgment of the Court of Common Pleas of Indiana county, in overruling a motion to open judgment and let the defendant in to make defense.

The petition in support of the motion alleged that judgment was entered on January 31, 1894, on a note dated February 27, 1893, made by C. O. Wachob and J. M. Hine, to W. R. Smith. On February 5, 1894, J. M. Hine, one of the defendants, presented a petition alleging that he had given no consideration for said note and asked for an issue to try whether he had signed the note in question or not. The court granted this petition.

The answer filed by plaintiff to the petition set forth, *inter alia*, that on a prior trial the defendant did not question the consideration, but defended upon the ground that he had never signed the note; that defendant knew the consideration; that respondent did not admit upon the trial that there was a want of consideration for the note in question, but his testimony shows, so far as he was permitted to give it, that there was a valid consideration.

Upon the trial of this issue the plaintiff testified that he had indorsed for Wachob a \$1500 note, he having borrowed that sum from the Indiana County Deposit Bank. The note was dated November 30, 1892, and was for 90 days. The day before this note matured the defendant Wachob delivered to the plaintiff the note which is the subject of the present suit.

In the course of cross-examination of plaintiff in the second trial of this issue it was developed that the defendant Wachob had confessed judgment to the plaintiff in this case for \$1500 about a year previous to the date of this note. On the third trial of the issue the verdict was against defendant. Before judgment had been entered on the verdict, the defendant petitioned the court to open the judgment entered against him for the reason that the plaintiff had admitted in his cross-examination that he had not given or surrendered anything to the defendant Wachob when he had delivered him the note in question.

The court overruled the motion to open judgment and defendant appealed, assigning as error the action of the court.

For appellant, D. B. Taylor, S. M. Jack and W. T. Cline.

Contra, J. N. Banks, Frank Keener and M. C. Watson.

Opinion by FELL, J. Filed January 4, 1897.

This appeal is from the order of the Court of Common Pleas discharging a rule to open a judgment. The proceeding was irregular, and the application was without merits on the facts. The judgment was by confession, and was entered in January, 1894. A rule to show cause why it should not be opened as to the defendant Hine, who is the appellant here, was made absolute in June, 1894, and the issue was limited to the inquiry whether he had signed the note. There had been three trials of this issue, and at the last trial the verdict was against him. A rule for a new trial had been discharged, but judgment had not been entered on the verdict, when the second application to open the judgment was made. This application was to open a judgment which was open, and as to which an issue had been framed and a verdict rendered. A motion for a reargument or to rescind the order discharging the rule for a new trial and to enlarge the issue would have opened the way for an application for the relief sought.

But had the proceeding been regular the relief could not have been granted. The new ground of defense set up was known to the defendant at the time of the second trial. It is alleged in the petition that it was developed at that trial by cross-examination of the plaintiff. No effort was made to take advantage of it then, or at the next trial, which took place six months later. It was not a new ground of defense based on after discovered evidence, and it was not a ground of defense at all.

Want of consideration is not a defense in an action on an accommodation note in the hands of a third party who has taken it as collateral security for an antecedent debt. The maker or indorser of accommodation paper may defend on the ground of fraud in the procurement or use of the note, and in this respect it is governed by the same rules that apply to commercial paper generally, but he cannot set up as a defense that it was given without consideration and pledged for a pre-existing debt. The decision in *Royer v. Keystone National Bank*, 83 Pa. 248, is in harmony with the rules stated in *Lord v. Ocean Bank*, 20 Pa. 384, and numerous other cases, that accommodation paper is a loan of the maker's credit without restriction as to the manner of its use. The syllabus in that case may be misleading, as it states the rule broadly and without reference to the facts of the case.

It does not appear from the report of the case that the note was an accommodation note, but it does appear that it was given for a specific purpose and fraudulently used by the payee, and the decision is distinctly based upon that ground. See *Carpenter v. Bank*, 106 Pa. 170.

The order of the court is affirmed at the cost of the appellant.

**In re SEWER ON BEECHWOOD AVENUE.
Appeal of CITY OF PITTSBURGH.**

Assessments for the construction of a sewer cannot be taxed upon non-abutting or watershed property owners as specified benefits.

Parker's Appeal, 169 Pa. 433, followed.

Appeal of the City of Pittsburgh from the decree of the Court of Common Pleas No. 1, of Allegheny county, in the matter of a sewer on Beechwood avenue.

The facts of this case appear in the opinion of the Supreme Court, *infra*.

It was submitted on paper books by *Clarence Burleigh* and *T. D. Carnahan*, for the appellant, and *Hugh S. Craig*, *R. B. Petty*, *Marshall Brown* and *James R. Sterrett*, for appellees.

Opinion by DEAN, J. Filed January 4, 1897.

In 1893 and 1894, the city of Pittsburgh, under the Act of Assembly of May 16, 1891, constructed what is known as Beechwood avenue sewer, a very extensive and costly municipal improvement, commencing near Frankstown avenue in the Twenty-first ward, and extending along Negley's run, Beechwood avenue and Butler street to the Allegheny river; then connecting with it are two main branches, almost equal in dimensions to the main sewer. The materials of construction are brick and stone; it varies in size from nine to three and a half feet in diameter, and its entire length is about 12,000 feet; the water shed of the surface which naturally drains into it is about 2300 acres; the total cost of construction was \$154,875.91; the main sewer is laid on the line of or near to a natural water course, Negley's run, for almost its entire length, and this is substantially the line of Beechwood avenue, laid out but not yet opened; consequently in its construction, the city entered upon private property of adjoining land owners for that purpose.

On April 15, 1895, the city, under the Act of 1891, petitioned the court for the appointment of viewers to assess the damages and benefits to property owners by reason of its construction. Viewers were appointed, who proceeded to perform their duty in a most thorough manner; they found the total cost, as before noticed, \$154,875.91; they assessed benefits on abutting

owners of \$36,874, and on owners not abutting, but in the water shed, of \$110,419.40, leaving a balance of \$7,582.51, imposed upon the city. After this report was framed, but before they had heard exceptions to it, the decision in *Park Avenue, City of Williamsport, Parker's Appeal*, 169 Pa. 433, was handed down, and a copy of the opinion laid before the viewers; thereupon they sustained the exceptions of all non-abutting property owners, and struck off the \$110,419.40, leaving the city to pay that in addition to the former balance, making altogether to be paid by the city, \$118,000. The report as thus made up was filed and confirmed *nisi* by the court. Thereupon, the city filed exceptions, alleging error on the part of the viewers in not assessing benefits on owners of property in the water shed, the natural drainage of which was into the new sewer. This appellee, with others, who were abutting property owners, and whose property was actually taken by the city, alleged the assessments of benefits against them were excessive, appealed and demanded jury trials. The court was of opinion that *Parker's Appeal*, *supra*, settled the law as to non-abutting property owners in their favor, and therefore overruled the city's exceptions. As to the demand for jury trials by those assessed with benefits, the court was of opinion that *Tourison's Appeal*, 171 Pa. 38, also settled the law against the contention of the city, and therefore refused to strike off the appeals.

The city took appeals on both questions involved in the final decree, but in the case before us the contention is only on the one issue—was it the duty of the viewers to assess non-abutting or the watershed owners with special benefits by reason of the construction of the sewer? Counsel for appellant admits that *Parker's Appeal*, *supra*, in terms decides the case in favor of appellee. His argument is, to urge us, either to overrule that case, or to draw a distinction between it and this one on the facts. *Parker's Appeal* was ably and fully argued by eminent counsel; it was carefully considered by this court, and deliberately decided. We believe the law of it to be amply sustained on both reason and authority. To overrule it would carry down with it the principle in *Witman et al. v. Reading*, 169 Pa. 375; *Morewood Avenue*, 159 *Id.* 20, and *Fifty-fourth Street*, 165 *Id.* 8. Nothing is advanced in the argument which was not considered in that case. Non-abutting property owners here on twenty-three hundred acres are assessed with special benefits, not because they are on the line of the sewer, but because at some future day they may, by lateral sewers, seek a connection with Beechwood ave-

nue main sewer. This is considered probable on account of the inclination of the surface of their land toward the sewer. In answer to this argument our Brother MITCHELL, in *Parker's Appeal*, pertinently remarks: "Nor does it appear that they ever will certainly have any special benefit, for the sewer connections on the plan may be changed, or if left on paper may never be carried out. To impose a present lien and obligation to pay where the special benefit is future and contingent on the will of the municipality would be a clear violation of the fundamental basis on which all such assessments rest. There is only one other class of non-abutting property, that which, though not on the same street, has a connection with the sewer in question by means of its own branch or lateral sewer. This class is in precisely the same situation as the property assessed in the *Morewood Avenue Case*, to wit, it was benefited by the increased facility of access by means of graded and paved streets, but, as was shown by our Brother GREEN, 'that is only the same general and public advantage which is enjoyed by all citizens of the Commonwealth passing over the improved street.'" The sewer district in this case was arbitrarily fixed by the city engineer, and may and could easily be changed as was done in *Pittsburgh v. Logan*, 165 Pa. 516.

The only present benefit derived by these owners is that Negley's run, which before furnished open drainage, has now been turned into a closed and covered sewer, thus confining the odors and noxious substances which cause discomfort and injure health. But this is a benefit enjoyed by the whole city in common with them. Clearly, the engineer's line, which marked the boundary of the twenty-three hundred acres, did not limit the benefits of wholesome air to the property owners of that particular locality.

As to a distinction between *Parker's Appeal* and this case, there is none, except in the greater cost of the improvement and the numbers affected by the assessment. We therefore adhere to *Parker's Appeal*, and affirm this decree.

PITTSBURGH v. HOEVELER et al.

Property owners can appeal and demand a jury trial from the award of viewers assessing them benefits for costs of laying a sewer partly across their property and partly within the lines of an unopened public street, though the viewers have found that the property owners have suffered no damage.

Appeal of the City of Pittsburgh from the judgment of the Court of Common Pleas No. 1, of Allegheny county, dismissing the petition of the appellee, that the order of court awarding a

jury trial in the matter of the appeal of W. A. Hoeveler, E. Hoeveler, Ernest W. Tabor and Amanda Tabor, from the report of viewers appointed in the matter of the construction of a sewer along the line of Beechwood avenue, in the Nineteenth and Twenty-first wards of the city of Pittsburgh, be revoked.

On the petition of the city of Pittsburgh viewers were appointed to ascertain the damages and assess benefits arising from the construction of a main sewer which went through the property, among others, of W. A. Hoeveler, E. Hoeveler and Amanda Tabor. The viewers made report on February 15, 1896, assessing the said W. A. Hoeveler, E. Hoeveler and Amanda Tabor's property for benefits to the amount of \$4,406. An appeal was taken by these property owners from this award, and on petition an issue was awarded. The city of Pittsburgh petitioned the court, setting forth:—

First.—The appeal is an appeal from the assessment of benefits made against the said property by the said board of viewers as a contribution to the payment of the costs of the construction of said sewer. It does not involve any assessment of benefits to pay damages for the taking, injuring or destruction of private properties belonging to any person or persons, nor does it involve any question of damage to the said property of W. A. Hoeveler, E. Hoeveler and Amanda H. Tabor.

Second.—The viewers did not allow or assess any damages to any property or to the owner or owners thereof.

Third.—The appellants claim no damages in their appeal except by reason of their benefit assessment; the language of said appeal being: "that by said action of said viewers in assessing your petitioner's property with \$4,406 peculiar benefits, your petitioners' property has been damaged, and that they therefore appeal from the said assessment of said viewers and demand that the damages and benefit sustained and received by them be determined by a jury according to the Act of Assembly in such case made and provided."

Fourth.—That in the absence of any question of damages involved in said appeal, the said appellants are not entitled by law to an appeal and jury trial.

And asking that the order of court of March 14, 1896, allowing said appeals for a jury trial, be revoked, that said demand for a jury trial be refused, and that the said appeal be stricken from the record.

This petition was dismissed by the court, SLAGLE, J., and the city of Pittsburgh appealed, assigning as error this action of the court.

For appellant, *T. D. Carnahan and Clarence Burleigh.*

Contra, *James R. Sterrett.*

Opinion by DEAN, J. Filed January 4, 1897.

The general proceedings ending in this decree have been stated in *City of Pittsburgh's Appeal*, No. 144 October Term, 1896 [*ante*, p. 317], and need not be repeated. The appellees here, and appellants from the award of viewers to assess damages and benefits, owned eighteen acres of farm land in the sewer district, on which was a small house; through this land, for the distance of nearly eleven hundred feet, was constructed Beechwood avenue sewer. The viewers assessed upon the land, by reason of the construction of the sewer, a net benefit of \$4,406, or about \$250 per acre for the tract; the owners appealed and demanded a jury trial, which the court below awarded, and from that decree we have this appeal by the city.

It is argued there is no right of appeal, because no question of damages is involved, only an assessment of benefits to pay costs of construction of sewer. This argument, it seems to us, ignores the substance of the whole proceeding resulting in the appointment of the viewers and their report. They say: "Beechwood avenue is located over private property and the sewer is very largely on the line of this location, but the avenue is not opened, and therefore the location of the sewer is still on private property to a great extent." Certainly in this case there was an actual taking of private property for public use when the city laid its sewer for 1100 feet through appellees' land. Then further, the viewers say: "Owners of certain properties have submitted claims for damages by reason of the location of the sewer upon their properties. These claims were all duly heard, but the viewers being of the opinion that no property had been damaged, but, on the contrary, that all the abutting properties have been specially benefited to the full amount of their respective assessments, have disallowed all claims for damages." It seems clear, in the most narrow construction of the constitutional right, and the statutory right under Act of 1891, these appellees could successfully demand a jury trial. Their property had been actually taken, and they had been assessed with a net benefit on a comparison of the damages and benefits. But we held in *Tourison's Appeal*, 171 Pa. 38, that in grading a street by the city, the result of the proceeding as a whole, is the payment of damages, which either the specially benefited lot owners must pay or the general public, the city, and that damages and benefits are a result obtained by a

comparison of the advantages and disadvantages; that a careful reading of the whole act led to no other conclusion than that an appeal was demandable by a lot owner who had been assessed with benefits. This decision was directly in the line of *Pusey's Appeal*, 82 Pa. 67. Nor is there any conflict between it and *Michener v. City*, 118 Pa. 535, as the court below states. The proceeding in the latter case was a *scire facias* on a municipal lien filed for the construction of a sewer on Carlisle street, a long-opened, built-up and travelled street, on which fronted the defendant's property. An affidavit of defense was filed, in which the owner averred the sewer did not specially benefit his property, and that its advantages inured to the general public, and therefore the enforcement of such claims was in derogation of his constitutional rights, in that it appropriated his property to public use without compensation. The lien was filed under the Act of March 13, 1886, which authorized city councils to construct municipal improvements and fix the rate of assessment. By ordinance, the rate was fixed at \$1.50 per front foot on abutting property owners, and the lien filed accordingly. The court below entered judgment against defendant for want of a sufficient affidavit of defense. On appeal to this court, the assessment was held to be municipal taxation for a city improvement, and that the legislative powers of councils to make such improvements as they deemed necessary, could not be questioned by the courts or the property owner in that form of proceeding. Neither in *Tourison's Appeal*, nor in this case, is the constitutional power of the city questioned; the right to make the improvement and assess benefits is conceded; the question in both is, has the property owner, in the method pointed out in the Act of 1891, in a proceeding for the assessment of damages and benefits, the constitutional right to demand a jury trial on assessment of benefits? Or to state his proposition in an exaggerated form, can the city construct through sparsely inhabited territory a sewer more than two miles long, of a size and material that makes its cost equal in value all the property abutting on it, and assess that cost upon the property as special benefits, and thereby deprive the owner of a jury trial? While this is an extreme case now, it may become not an uncommon one, if the owner be deprived of his right. A most careful reconsideration of the legislation passed on in *Tourison's Appeal*, *supra*, has only served to convince us that it was rightly decided, and we adhere to it. We admit the inconvenience to the city of the delay in collection of benefits which results from protracted litigation; but

that will not warrant a strained construction of the law, so as to deprive the owner of a constitutional right; it is rather a suggestion to the city that before making extensive improvements, it should carefully consider not only the cost, but the delays incident to collection of the cost from the citizen.

The decree of the court below is affirmed.

**In re SEWER ON BEECHWOOD AVENUE.
Appeal of CITY OF PITTSBURGH.**

These cases were upon the same state of facts as those upon which *Pittsburgh v. Hoeveler*, *supra*, was decided and were argued together with it.

For appellant, *T. D. Carnahan and Clarence Burleigh*.

Contra, Marshall Brown, R. B. Petty, J. M. Shields and J. H. Harrison.

Opinion by DEAN, J. Filed January 4, 1897.

These appeals are from the same decree as that of the City of Pittsburgh in No. 94 June Term, 1896 [*ante*, p. 318], awarding jury trials to Hoeveler and others. The sewer runs through the gas company's land, 780 feet; Finley's, 2500 feet; Black and Park's, 500 feet. Each one of the appellees appeared before the viewers and claimed damages; they also offered testimony in support of their claims. The viewers disallowed their claim for damages, and assessed them with benefits. On their appeal from the assessment, the court below granted their demand for jury trials. We have nothing to add to what we have said in the *Hoeveler case*. The court was clearly right, and the decree is affirmed.

**Court of Common Pleas,
WESTMORELAND COUNTY.**

GRAHAM v. BLANK and WELSH.

Judgment cannot be taken for want of an appearance if the plaintiff does not file his statement of claim before the return day.

Neither can judgment be taken for want of an affidavit of defense if the plaintiff has not given the defendant fifteen days' notice of the filing of the statement, though the statement was served on the defendant provided the suit has not been brought and statement served fifteen days before the return-day.

No. 85 Nov. T., 1893. Petition to open judgment.

Opinion by McCONNELL, J. Filed January 30, 1897.

We are asked by F. A. Blank to open a judgment entered against him on October 22, 1896, "by default for want of an appearance and for

want of an affidavit of defense." The summons in the case, issued on September 4, 1893, was served by the sheriff on both defendants above named on the day it issued, and was returnable on the first Monday of October, 1893. No copy of plaintiff's statement was served with the writ, nor had any been served or filed on the return-day of the writ. Subsequently, to wit, on July 11, 1894, the plaintiff filed his statement. On July 18, 1894, there was served on defendant Welsh a copy of plaintiff's statement, and on October 8, 1896, defendant Blank was served with a copy of said statement by having it left at his residence with an adult member of his family. No appearance was entered by either of the defendants till after judgment was taken. It is claimed by the defendant Blank that judgment could not regularly be entered against him under the foregoing state of facts; and he alleges that before a judgment by default can be entered against him, the plaintiff must do what he did not do in this case, viz., serve defendant with a notice that, unless he file an affidavit of defense on or before a designated time, judgment will be taken against him for default thereof, and also that there be fifteen days' notice that the statement has been filed. He therefore asks that judgment be opened and he be allowed to defend, and tenders an affidavit of defense which he alleges meets the whole of the plaintiff's claim. For the purposes of this rule, we may so consider it. The question now for disposition must be solved by considering the regularity of the entry of the judgment—the question of the sufficiency of the affidavit is not necessarily involved in this case, and is to be considered on a rule of a different kind.

1. It is first to be observed that the default alleged as the ground for entering judgment is for "want of an appearance and for want of an affidavit of defense." We need not consider the question of whether the law now authorizes a judgment for want of an appearance. We may assume that it does, though this may be an unwarranted assumption. If the right exists, it is by virtue of the Act of 1836. It has been repeatedly held that filing a declaration before the return-day of the writ is a condition precedent to the right of the plaintiff to take judgment for want of an appearance: *Melloy v. Burtis*, 124 Pa. 166; *Kohler v. Luckenbaugh*, 84 Id. 258; *Fbreman v. Schrioon*, 8 W. & S. 43; *Dennison v. Leech*, 9 Pa. 164; *Black v. Johns*, 68 Id. 83. The plaintiff had not fulfilled this condition precedent by filing his statement before the return-day. He was therefore not entitled to take judgment for want of an appearance.

2. Was he entitled to take judgment for want of an affidavit of defense?

The third section of the Procedure Act of 1887 says: "The plaintiff shall be at liberty, in each of said actions, to serve a copy of his statement on the defendants. If such service be made not less than fifteen days before the return-day of the writ, it shall be the duty of the defendant in the action of *assumpsit* to file an affidavit of defense on or before the return-day." The plaintiff did not serve his statement not less than fifteen days before the return-day of the writ; therefore defendant was not in default by not filing an affidavit of defense on or before the return-day.

The sixth section of the same act provides as follows: "If the plaintiff shall neglect to serve his statement at least fifteen days before the return-day of his writ, he may file it on or at any time after the return-day; and in the action of *assumpsit*, unless the defendant shall file a sufficient affidavit of defense within fifteen days after notice that the said statement has been filed, the plaintiff may move for judgment for want thereof." The time does not begin to run from the filing, but from the notice of filing. The defendant has fifteen days after such notice. It follows that if such notice is not given, that defendant can be in no default. Such notice was not given in this case. There is of record proof that a copy of plaintiff's statement was left at petitioner's dwelling-house with an adult member of his family on October 6, 1896. The defendant admits this and attaches the paper so served to his petition in this case. This paper does not contain any notice that the original had been filed in the case in court, and that judgment would be entered if no affidavit of defense should be filed. The statute may not require notice of the consequence of the defendant's neglect to file an affidavit of defense to be given to him before the plaintiff can take judgment by default, but it certainly does require notice that the statement has been filed before the plaintiff can move for judgment. There has been no default until that notice has been given. In the case of *Honeywell v. Tonery*, 5 Kulp. 360, it was decided that "if the statement be filed after the return-day, the defendant is entitled to fifteen days' notice of the filing; mere service of copy is not enough." There is nothing prescribed in the act about the service of a copy of the statement after the return-day. There is something said about the service of a notice that a statement has been filed after the return-day. The default cannot commence until such notice be given. It was not given in this case. Therefore the defendant was not in

default for not filing an affidavit of defense after the return-day of the writ.

We concluded above that the defendant was not in default for not filing an affidavit of defense on or before the return-day, and have here concluded that he was not in default after the return-day; it consequently results that he is not in default in that regard at all.

The judgment being unwarranted on both the grounds of want of appearance and want of affidavit of defense should be set aside. The petitioner only asks that it be opened; and that order will therefore be made.

Counsel for plaintiff cite rules Nos. 18 and 9 in support of the judgment. Rule No. 18 is only applicable to cases of appeal, and rule No. 9 to actions of *scire facias*. This is neither an appeal nor an action of *scire facias*, and it is therefore not subject to the control of these rules.

And now, January 30, 1897, the judgment entered against petitioner, F. A. Blank, is opened as prayed for.

For plaintiff, *Atkinson & Peoples*.

For defendants, *S. A. Kline*.

WASHINGTON COUNTY.

In re OHIO VALLEY GAS COMPANY.

A natural gas company, formed and operating under the laws of Ohio, can exercise the right of eminent domain in this State under the Act of May 29, 1885, relating to the formation and rights of natural gas companies, provided it has complied with the terms of the Act of April 23, 1874, requiring foreign corporations to file certain papers with the Secretary of the Commonwealth before doing business.

When a public corporation having the right of eminent domain (in this case a natural gas company) takes land it is sufficient if the petition state the size of pipe to be laid, the number of feet of land it will traverse and its general or approximate direction.

No. 140 Feb. T., 1897. Petition for approval of land-damage bond to J. M. Stilley.

Opinion by McILVAINE, P. J. Filed January 14, 1897.

The petitioner, a corporation under the laws of the State of Ohio, desires to lay a pipe line for the transportation of natural gas across the farm of J. M. Stilley, the exceptant, and as the parties have not been able to agree upon the compensation that should be received by Mr. Stilley for this privilege, and as he has refused to accept security for the damage that may be done by the laying of this line across his farm, the petitioner corporation, after notice, has presented its bond with sureties for our approval, as provided by the Act of May 29, 1885, P. L. 29. J. M. Stilley, the land-owner, objects to the approval of the bond on three grounds:—

(1) That the petitioner, a foreign corporation, does not have the right of eminent domain.

(2) That the sureties are not sufficient; and

(3) That the easement which the company is about to locate upon, over and across his land is not sufficiently described and defined in the petition filed.

After hearing the testimony that was taken, and from our personal knowledge, we are of opinion that the sureties are good and sufficient; and we are also of opinion that the exact location of the proposed pipe line, by courses and distances, need not be given in the petition asking for the approval of the bond in a proceeding of this kind. It is sufficient if the size of the pipe, the number of feet it will traverse the farm, and its general or approximate direction are stated in the petition; this the company has done in the petition filed. In cases of this kind, the company do not usually ask to appropriate a strip of ground of definite width, as in the case of a railroad company, as the pipe across agricultural lands is buried, and the land-owner uses the ground over the pipe. A plot, however, should be attached to the report of viewers when the damages are assessed, to define the exact location of the easement and the rights of the company on the exceptant's land. But in fixing the amount of the bond and passing on the sufficiency of the sureties, it is unimportant; indeed, the company could not very well furnish a plot until it has made an entry on the land and located its line by actual survey, and an entry on the exceptant's land without his consent, and before a bond is accepted or approved, would be a trespass.

This brings us to the consideration of the question of the right of the petitioner to enter upon the exceptant's land without his consent first having been obtained.

There are two relevant propositions that we think cannot be controverted:—

(1) The laws of Ohio which gave the petitioner corporate existence have no force in this jurisdiction, and in the absence of Pennsylvania legislation, it could only claim to do business in our Commonwealth by reason of the comity that exists between the States, and this would not justify it entering upon the land of a citizen of this State without his consent.

(2) The power of eminent domain is vested in the State of Pennsylvania, and no one can exercise that right over land within her borders without the consent of her Legislature.

These two propositions being correct, the petitioner company cannot enter upon the defendant's land in the exercise of this right, unless it can justify such entry by some Act of Assembly

of the State of Pennsylvania. The Legislature can, in its discretion, say how the power of eminent domain vested in the State can be exercised. It may delegate this power to an agent. That agent may be a corporation carrying on a work of public utility, though for the purpose of private gain. And it may be a corporation chartered under the laws of another State: 39 N. Y. 171.

This brings us to the consideration of two Acts of Assembly passed by our Legislature. And the first is the Act of April 22, 1874, P. L. 108, and the other is the Act of May 29, 1885, P. L. 29. The first act requires foreign corporations, before doing business in this State, to file in the office of the Secretary of the Commonwealth a certain statement. Having done this, their corporate existence will be recognized in this State. The petitioner in this case, by the certificate of the Secretary of the Commonwealth exhibited at the hearing, has shown that it, on November 16, 1896, complied with the requirements of this act. It is therefore now a corporation in the State of Pennsylvania, engaged in producing and marketing natural gas.

The second act, in section 10, provides "that the transportation and supply of natural gas for public consumption is hereby declared to be a public use;" and therefore corporations engaged in that business can have properly delegated to them by the Legislature the power of eminent domain.

This section of the act also provides as follows: "Any and all corporations that is or are now or shall hereafter be engaged in such business shall have the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas," etc. It will be noticed that this section does not limit the power here conferred to companies incorporated under the act. The grant is in the most general terms: "Any and all corporations," with only one limitation, and that is, they must be "engaged in such business," the business of transporting and supplying natural gas for public consumption. That the grant is not confined to companies incorporated under the act is expressly decided in *Carothers v. Philadelphia Co.*, 118 Pa. 468.

If we are right in our line of reasoning, it follows that the petitioner company has the right to enter upon the exceptant's land for the purpose indicated in the petition, and its bond must be approved, and it is now so adjudged and ordered.

For petitioner, *R. W. Irwin.*

For exceptant, *J. R. McQuaide and T. Jeff. Duncan.*

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No. 37.

PITTSBURGH, PA., APRIL 7, 1897.

Supreme Court, Penn'a.

SCHIEHL'S ESTATE.

A gift of money, claimed to have been made at the time a mortgage was taken for its repayment, which was retained by the mortgagee until her death, and on which interest was paid by the mortgagor, is not shown by testimony of declarations of the mortgagee, at the time the mortgage was given, that she had given the money to the mortgagor as a present, and did not want the money, and that she only took the mortgage in case she died before the mortgagor.

Parol evidence that money loaned, for the repayment of which a mortgage was taken, was not to be repaid, but merely the interest thereon during the mortgagee's life, is inadmissible to vary the mortgage, unless such stipulation was omitted from the mortgage through mistake or fraud.

A gift of a mortgage by mortgagee to mortgagor is not shown by testimony of declarations by the mortgagee that she intended and had given the mortgage to the mortgagor where the mortgage was retained by the mortgagee during her life, and interest paid thereon by the mortgagor.

Appeal of Peter Schiehl from a decree of the Orphans' Court of Allegheny county refusing to surcharge the account of Magdalena Armbruster as executrix of Rosina Schiehl, deceased.

The facts of this case appear in the opinion of the Supreme Court, *infra*.

For appellant, *Joseph Breil*.

Contra, *Ammon Brothers*.

Opinion by GREEN, J. Filed January 4, 1897.

The mortgage in question in this case was made in 1883 by the appellee, Magdalena Armbruster, to the decedent, Rosina Schiehl, to secure the payment of \$1,500. It was duly recorded, and was in the possession of the decedent during the remainder of her life and at the time of her death. The mortgagor made many payments of interest on it during the decedent's life, and sold her some groceries which were to go on account of interest. At the death of the testatrix this mortgage was among her papers, and constituted apparently a part of her estate. The mortgagor, having been appointed executrix of the will of the deceased, settled an account in which she did not charge herself with the mortgage, or the debt secured by it; and the appellant, who was the husband of the decedent, sought to surcharge her with the amount of the mortgage and interest due there-

on. The auditing judge surcharged the accountant with the mortgage and interest, stating in his opinion that there was no sufficient evidence of the husband's consent to the gift. Upon exceptions filed, however, he changed his mind upon this subject, and held there was sufficient evidence of his assent, particularly after his wife's death, and thereupon the exceptions were sustained and the surcharge stricken out.

It seems to us that the most important question in the case is whether there was sufficient evidence of a gift at all to overcome the clear and undisputed title of the mortgagee. If there was a gift of the mortgage, it must have been made in the lifetime of the mortgagee. There could be no such thing as a parol gift to take effect in the future, after the death of the mortgagee. In point of fact, the title claimed by the mortgagor was a title by gift, made at the time the mortgage was given. The obstacles in the way of that theory are of the most serious character. In the first place, the mere fact that a mortgage was taken at all is entirely inconsistent with the theory that the money which the mortgage represented was intended to be given to the mortgagor. The mortgage was a solemn obligation, under seal. It was recorded, and was a pledge of the real estate described therein for the security and payment of the debt. Moreover, in the second place, interest on the money was to be paid, and actually was paid, by the mortgagor to the mortgagee, during most of the time from the date of the mortgage in 1883 until the death of the mortgagee in 1893. The proof is very clear and entirely persuasive that not only did the mortgagor pay the interest during all that time, but also that the mortgagee required her to pay it. Almost the whole of the testimony consisted of proof of declarations made by the mortgagee, and there was a great abundance of such testimony, showing that the mortgagee was constantly claiming the interest, and asserting that the mortgagor owed her interest, and that she had much difficulty in collecting it, and was obliged to take groceries in payment, for which she was charged double price by the mortgagor. For instance, Mrs. Rosina Rose, a disinterested witness, who lived only two doors from Mrs. Schiehl, and saw her every day, and was with her on Tuesday before she died on Monday following, testified that she asked her what she should do for her, "and she allowed she did not want anybody but Mr. Schiehl and me, and she allowed to me at that time that Mrs. Armbruster had borrowed \$1,500 from her, and she had such a terrible time in getting the interest on it. . . . Q. Did she say anything else about her? Did she ever ask you

to go for her sister, Mrs. Armbruster, to come over and watch her? A. No, sir; I asked her through the week if my children ought to stop and tell her she was sick, and she allowed no; she did not want her near her, because she was always bothering her for a present of that mortgage, and she could not have it." Another witness, Mrs. Merkel, said: "She often told me Mrs. Armbruster owed her \$1,500; that she had loaned it to her; and that she could not get any interest, and she took it out in groceries." Mrs. Schultz, who kept a little grocery store two doors from Mrs. Schiehl, said of Mrs. Schiehl: "She came down and got a few little things of me, and she told me she could not buy much, as she had to take all her groceries from her sister; that she loaned her money, and she had to take the groceries on account of the interest." Another witness, Isador Miller, testified that he knew Mrs. Schiehl, and had conversation with her about her money matters, and that "she told me one time her sister had loaned \$1,500 from her, and she could not get any interest. . . . She said, sometimes she wanted to come down and get some money from Mrs. Armbruster, and she could get none. . . . She said she loaned her \$1,500, and when she would come down to get some money, she could not get some." Felix Merkel testified: "She [decedent] said that her sister owed her \$1,500, and that she could not get the interest, and she had to take it out in groceries." This was two or three months before her death. Mrs. Bauman said: "She talked to me, and said her sister owed her \$1,500, and would not pay her interest on it. . . . She had said that repeatedly to me. . . . She just said, when she went to get her money, it made her mad; that she would have to take everything in groceries." There was more of this kind of testimony given by the exceptant, but it is not necessary to repeat it. It is absolutely at war with the fundamental theory of the accountant, which was that she was the owner of the mortgage by gift from the mortgagee. She was certainly not the owner in point of fact at any time. She never had it in her possession; it never was delivered to her; it never was assigned to her. The title of the mortgagee to the mortgage was never divested by any act of any kind, and it remained her own exclusive property up to the moment of her death. The mortgagor was to pay, and did pay, the interest on it, and the mortgagee constantly demanded the interest, and thereby asserted her ownership to the last. Nor is it denied by the mortgagor that she was bound to pay the interest. In view of these manifest and uncontradicted facts, the claim that the

mortgagor was, during all this time, the owner of the mortgage, or of the debt which it was given to secure, is absurd, and cannot possibly be sanctioned.

The title asserted by the mortgagor is of a very vague and indefinite character, founded exclusively upon the loose and uncertain testimony of verbal declarations of the mortgagee, many of which were conflicting with each other, in some of which a gift of the money, and in others a gift of the mortgage, is asserted, and in some of them an agreement is declared to the effect that the principal was never to be paid, but the interest, or so much as the mortgagee needed, was to be paid.

The acquisition of contract rights, or property rights, by this sort of testimony, has been so frequently and so emphatically condemned by this court that it is not necessary to cite the authorities. A brief examination of the testimony given by the accountant and her witnesses in support of her claim will demonstrate its utter insufficiency to establish anything like a legitimate title to the mortgage in question.

The accountant was herself cross-examined as a witness, and gave this version of her claim: "I borrowed \$1,500 from my sister, which she gave me as a present, and for which I gave her a mortgage." How the sister loaned her \$1,500, and took a mortgage for it, and at the same time gave it to her as a present, cannot possibly be understood. She said, further: "I gave that mortgage to my sister in 1883. My sister would not have taken the mortgage if she thought she would die before me. She made the mortgage if I should die before her." It is only necessary to say to this that "her sister" did not make the mortgage, and there is nothing in the mortgage about the accountant dying before her. Again: "I have not paid that mortgage, as she gave it to me as a present." Here she asserts a gift of the mortgage, instead of the money; but both assertions were equally untrue, because there never was any gift of the mortgage. Her sister retained it always to the time of her death. Again: "I paid a little interest on it. My sister said to me I should give her a little interest if I could, and 'if you cannot, it is all right.' And the last three or four years I gave her groceries and some money, and she said, when she came to town, she would give me a receipt for it, which she did not do. I got one receipt for \$360, which is marked 'Exhibit No. 1.' She owed me for groceries. She put everything in her book, and kept the account herself. I gave her groceries and money after the date of this receipt, and of which I have kept no account. When we had this set-

tlement in 1890, it did not take us long to come to a settlement. She wrote everything on a paper, and gave me the receipt. And I have paid money since that time. . . . I gave her groceries for the interest, and she said to me, 'When you need the money, I will give you the money.' . . . I gave her \$100 to \$120 in groceries. I only got the one receipt, which comes down to June, 1890. I gave her groceries and money since that time, but I don't know how much." The utter worthlessness of her claim to be the owner of the \$1,500 of money, or of the mortgage, as a gift, is demonstrated by her own testimony. Of course, if she was the owner of the money, she could not be paying interest on it, because she did not owe any interest; and if she was the owner of the mortgage, she could not be constantly acceding to an adverse claim of its ownership by her sister. The woman was evidently endeavoring to account in some way for the impossible fact of her having given a mortgage to secure the payment of money which she did not owe, because it was her own, and of her constantly, during a number of years, paying interest on a mortgage which belonged to herself. Of course, she did not succeed.

The accountant's son was also examined, but his testimony was no better than his mother's. He said: "I was present when the mortgage of Magdalena Armbruster to the decedent for \$1,500 was written out, and was there with mother and Rosina Schiehl when it was signed. Rosina Schiehl gave my mother the money, a few days before this mortgage was made, as a present to build this house. . . . She told my mother she never wanted the money. . . . She made the mortgage in case my mother should die, and in case she would ever get in need, us children could help her along by paying the interest. The understanding was the \$1,500 was never to be paid. Just part of the interest, if she needed it, during her natural life, and if my mother should die before, us children should pay the interest." As a matter of course, if the \$1,500 was given "as a present to build this house," the accountant never owed any of it to her sister. Nevertheless, she gave a mortgage for it, and paid interest on it, and, if her sister wanted interest, the "children" were to pay it if their mother died before her sister. If their mother or her children were to pay interest on it, the money was not *given* to their mother; and if a mortgage was to be given to the accountant's sister to secure the payment of the money by creating a lien on the mortgagor's real estate, it is idle and frivolous to talk either of the money or the mortgage being a gift to the mortgagor.

The rest of the testimony in support of the accountant's claim consists of vague, loose, conflicting and contradictory declarations made to strangers; and it is the same stale, old, flimsy chatter that we so often have before us, and so often repudiate and condemn in all this class of cases. For instance, Mrs. Bruter was called by the accountant, and she testified as follows: "Mrs. Schiehl told me she had gotten a mortgage of Mrs. Armbruster, and when she would die she would give it to her for a present; if she would die before her sister, she would give it to her for a present." This is a new version of the story. According to this testimony, Mrs. Schiehl, being the owner of the mortgage, said to this witness that she would give it to her sister for a present if she would die before her sister. This was a declaration that she intended at some time in the future to give the mortgage to her sister. Of course, as will be hereafter shown, such a purpose to make a gift is absolutely nugatory unless it is followed, before death, by an actual gift, with delivery of possession; but at the present we only wish to show the utter inconsistency and contradictory character of the testimony upon which the accountant's claim is attempted to be supported. This testimony proceeds upon the fundamental idea that the mortgage belonged, not to the accountant, but to her sister, the decedent, and that it was to be given in the future, and hence could not have been already given in the past. If this testimony is to be believed, the decedent had never given the money to the accountant, and had never parted with her title to the mortgage.

Mrs. Ammerdick, a daughter of the accountant, testified: "Mrs. Schiehl told me she never wanted the \$1,500; that after her death it was mother's as a present; and if she wanted a little interest, she would get it; and if she hadn't it, she was satisfied with it. . . . She said mother was to have the mortgage." Here, also, was a declaration of a purpose to make a future gift, to take effect after her death.

Mrs. Clinsing, another daughter of accountant, testified for her as follows: "Mrs. Schiehl said she gave \$1,500 to mother as a present, and never wanted it back. She said, 'Isabella, I gave your mother \$1,500 for a present. You will get some of that, and I never want it back.' She was positive she did not want it back, as she had given it to mother as a present." She repeats the same story in her cross-examination two or three times. According to this testimony, the money was given as a present, and therefore belonged to the accountant from the very beginning. Mrs. Dank, another

witness for the accountant, testified: "I often heard her [Mrs. Schiehl] say that this \$1,500 belonged to her sister, and she had given it to her as a present, and that she could give her the interest on it." She repeats the same statement several times. One more witness, Catharine Keller, speaking of a conversation she had with Mrs. Schiehl, was asked: "Q. What did she say about the \$1,500? A. She said the mortgage was hers, and if she could not pay any interest it was all right. Q. By 'her' she means Magdalena Armbruster? A. Yes, sir; I mean her." According to this testimony, it was the mortgage, and not the money, that had been given to the accountant.

The foregoing is the substance of all the testimony given by the accountant. A mere perusal of it shows that it will not bear the least investigation. There is no certainty arising from it as to what the accountant's claim really is, because her contentions are entirely conflicting and contradictory. Her claim that the \$1,500 of money was given to her as a present is an absolutely unfounded claim, which cannot possibly be sustained in any aspect of the testimony. We know absolutely, and from her own testimony, that it was not given to her. She says herself, "I borrowed \$1,500 from my sister, . . . for which I gave a mortgage." But the fact that she gave a mortgage for the money is an incontestable and undisputed fact, and hence she could not have been the owner of the money, by gift or by any other title. Moreover, she constantly paid interest on the money for years, and never ceased to be a borrower of the money as long as her sister lived. The transaction was a loan of money beyond all possible question, for which a mortgage was given in the ordinary form under seal, conditioned for the payment of principal and interest. This mortgage was delivered to the decedent, and held in her exclusive possession until her death.

If it be contended that the mortgage was given upon a condition that the principal was never to be paid, and only such interest as the obligee needed, the manifest reply is that there is no such explicit testimony in the case; and, if there were, it is merely verbal testimony to contradict, alter, change and nullify a solemn, sealed, and delivered obligation, in no part of which do any such terms or conditions appear. Moreover, there is not a scrap of testimony anywhere in the case that any such conditions were agreed upon and omitted to be inserted in the instrument by any mistake, fraud, or imposition on the part of any one, or that such a thing was ever asked or consented to by anybody. There is not a single element appearing in the testi-

mony which would be necessary—indispensable—to bring the case within the line of decisions under which written instruments may be changed by parol. This branch of the case may be dismissed without further comment.

The only remaining contention, that the mortgage was given to the accountant, is in a still worse condition, if that were possible, than either of the others, because it is both physically and legally untrue. The mortgage was never given to the accountant, but remained in the decedent's possession until her death, and was found among her papers after her death. This is distinctly proved by the testimony of Peter Schiehl, by the accountant, and by her daughter, Mrs. Ammerdick, both of whom hunted for it, and could not find it, the evening before Mrs. Schiehl's death.

On the legal aspect of this subject the authorities are most clear and explicit. In the case of *In re Campbell's Estate*, 7 Pa. 100, the accountant was the administrator and favorite nephew of the intestate, and was indebted to his uncle upon several promissory notes, which his uncle held against him. It was distinctly proved before the auditors that the intestate made a distribution of his securities in his lifetime among various relations, and had assignments of them duly prepared and executed. When this was being done, the intestate was asked by his wife what he would do with the accountant's notes, and he replied by directing her to either burn them or give them to him. She delivered them to accountant after her husband's death. Nevertheless this court held he was liable for them, and surcharged him with them. GIBSON, C. J., delivering the opinion, said: "The notes in question could have been discharged only by a sealed release or a parol gift of them. This disposition insisted on by the accountant was neither. A gift is a contract executed; and, as the act of execution is delivery of possession, it is of the essence of the title. It is the consummation of the contract which, without it, would be no more than a mere contract to give, and without efficacy for the want of a consideration. . . . The gift of a bond, note, or any other chattel cannot be made by words *in futuro*, or by words *in presenti*, unaccompanied by such delivery of the possession as makes the disposal of the thing irrevocable. . . . Nothing discharges it while it remains in the creditor's possession and power. The cases all agree, not excepting even *Went v. Dehaven*, 1 S. & R. 317, that the parol discharge of a debt, without consideration or delivery up of the security, is inoperative." After stating the facts of the case, including the direction to his wife to destroy or deliver them, the

chief justice says: "But all agree that the possession was not parted with; and it cannot be disputed that his intention to have them destroyed or delivered up might have been abandoned, and his directions countermanded. They were his property while he lived; and as the direction was not a testamentary one, it became inoperative at his death. It was a mere authority, which expired with him."

How infinitely stronger is this cited case than the case at bar! There there was no question about the intent of the owner, and his positive direction to his wife to destroy or deliver the notes. And yet, because this was not actually done in the owner's lifetime, it was nugatory. Here everything is in dispute. There was no direction to destroy or deliver the mortgage, there was no pretense of an assignment of it, and it remained in the owner's possession and control until her death. The only testimony as to an intent to give are the flimsiest and loosest kind of declarations, which are abundantly contradicted by more testimony of declarations that she never had such an intent. Still worse, the accountant and her witnesses give conflicting and contradictory testimony as to what the declarations really were. But, if there were no questions of this kind in the case, and if an intent to give and a direction to deliver had been fully proved by undisputed testimony, it would have amounted to nothing under the authority of the case last cited.

In *Kidder v. Kidder*, 33 Pa. 288, the decision in *Campbell's Estate* was approved and followed. There, also, the facts were vastly stronger than in this case. The plaintiff, in an action of *assumpsit*, held a promissory note for \$454 against two persons. He executed a release in writing, but not under seal, of one of the defendants from all liability on the note. The court below held this to be a good release of the cause of action, but this court reversed the judgment, holding that the release, not being under seal, was without consideration, and that, as a gift, it could not be sustained, because the note was not delivered to the debtor. THOMPSON, J., delivering the opinion, said: "The release in question in this case is without a seal, and without any consideration expressed. As a release, it was void. It was *nudum pactum*, and should have been so held by the court. The defendant in error, feeling the force of the want of consideration, as a dernier resort has endeavored to give effect to the release as a gift to the releasee of one-half of the demand. But this is, if possible, a more hopeless undertaking than that of supporting the release without a consideration. It was not an executed gift, even if the instrument

would bear the interpretation that a gift was intended, because the instrument to be given was not delivered. If, then, it was but an agreement to give, it could not be enforced without a consideration, any more than could a release. On this point the case of *In re Campbell's Estate*, 7 Pa. 100, need only be cited." Then follows the citation already quoted. In this case, also, there was not the least question as to the intent of the plaintiff to release the cause of action. It was expressed in writing, and signed by the plaintiff, but, because it was not under seal, and no actual consideration was proved, it could have no effect as a release, and could have none as a gift, because the note was not delivered. In the present case there never was any such thing as a release of the mortgage, and, of course, there never was any consideration for either a gift or a promise to give. The accountant had borrowed and received the whole \$1,500 from the testatrix, had given a mortgage for its payment, had never obtained any kind of assignment or release, and had never received the mortgage from the owner. Of course, she had no kind of title to it. In the case of *Zimmerman v. Streep*, 75 Pa. 147, the facts were that Streep held a bond against Zimmerman, and he indorsed on it: "I request my executors to give this bond to Anna for her great kindness she has shown to me and her grandmother." This was signed and sealed. After it was written, "This is not to interfere with what I will to her. This she is to have beside that." Anna was a granddaughter of the obligee and the wife of the obligor. The bond was not delivered to Anna, but remained in the obligee's possession, with his securities, until his death. *Held*, that the bond did not pass to Anna. The indorsement indicated a prospective gift. There being no delivery, it was without operation. The Court of Common Pleas delivered a very elaborate and exhaustive opinion, in which numerous authorities were considered, and it concluded as follows: "It is clear, from these authorities, that unless there be a delivery of the chose in action or an assignment of it, to the donee, the gift is not executed, and the donee acquires no right under it." This court affirmed the judgment in a short *per curiam* opinion, approving the opinion of the lower court.

It is not necessary to extend the citations. They are not controverted, and are the undoubted law of the Commonwealth. The appellee cites *Livingood's Appeal*, 167 Pa. 191, to sustain the contention that the title to the mortgage passed to the accountant. An examination of that case, however, shows that the facts were entirely different. There the decedent in

his lifetime directed his wife to deliver to his brother a bond and mortgage which he held against him. The wife actually did deliver the securities to the brother, who took them into his possession, and subsequently returned them to the wife of the obligee with a request that she would keep them for him until he called for them, which she agreed to do, and continued to hold them for the obligor as his bailee or agent until after the death of the obligee. She placed them, after his death, in a box in which the obligee had kept other securities, and they remained there until the time of the appraisal. In addition to this, the auditing judge found as a fact that the obligee had forgiven the debts evidenced by the securities in question by repeated declarations to that effect, and had also requested the obligor, who was his brother, and attorney at law, to make oath to a statement as required by Act of Assembly relating to taxes of mortgages and money owing by various persons to the obligee, from which the bond and mortgage owing by the brother were omitted, and at the bottom of which was the following: "The judgment of seven hundred and mortgage of five thousand dollars against William H. Livingood is satisfied. Witness my hand this eleventh day of April, A. D. 1891. James C. Livingood. Witness present: Catharine A. Livingood."

The auditing judge further found "that the decedent intended to forgive, and actually did forgive, the debts of said William H. Livingood," mentioning them, and "that from February 19, 1890, or very soon thereafter, until after the death of the decedent, the securities for the said debt were in the possession of the said William H. Livingood, by directions of the decedent." He further found as follows: "I have found as facts, the intention of this testator to forgive these debts, and his actual delivery to the accountant of the securities for them, and that the securities were in the possession of the accountant at the decease of the testator." Upon these facts it was ruled by the Orphans' Court and affirmed by this court, that there had been an actual delivery of the securities to the debtor, who thereafter held them in his possession until the death of the obligee. It is only necessary to say that there are not only no such facts in the present case, but that the actual facts are diametrically opposite to these.

The case of *Davidson v. Young*, 167 Pa. 265, is also cited for the appellee, but is no more applicable to this case than the last one cited. It was an issue of fact to determine the validity of a judgment given by a son to his father, where it was alleged and proved that at the time the

judgment was given it was verbally agreed between the parties that the judgment was given merely to secure the father's support in case he met with reverses, and that no portion of it was ever to be collected unless he needed it for that purpose. The question was whether the bond was given in pursuance of a contemporaneous parol agreement that it was only to be used if needed for the father's support. The evidence was overwhelmingly to that effect, and the jury so found. It was not a bond given for the loan of money, but for the special purpose named. Of course, there are no such facts in this case, and the authority cited has no application. In the view that we take of this case the matters discussed in the paper-books have but little relevancy, and are not essential to its determination. There never was any title in the accountant to this mortgage, and she must therefore account for it. Inasmuch as the accountant is the sole residuary legatee of the exceptant's wife, who has excluded him in his old age from any share of her estate, is not a matter of surprise that he should claim what the law gives him, against the will; and it should be the duty of the courts to see that he is not to be "conversational" out of his plain statutory right by the uncertain, conflicting, contradictory, vacillating utterances of his wife. The assignments of error are sustained.

The decree of the court below is reversed, at the cost of the appellee, and the record is remitted, with instructions to surcharge the accountant with the mortgage in question and interest thereon, and to restate the account, and make distribution in accordance with this opinion.

GILLESPIE v. KEATING.

A. issued an execution against B. B. subsequently made an assignment for benefit of creditors. C. then issued execution against B. The sheriff delayed a sale on A.'s writ for a long time in spite of A.'s protests. *Held*, that the delay of the sheriff should not result in defeating A.'s claim. C. having an execution subsequent to the assignment is not in position of an execution creditor objecting to prior levies.

Appeal of the Western Electric Company, from an order of the Court of Common Pleas No. 2, of Allegheny county, dismissing exceptions to auditor's report, in an action by T. A. Gillespie against A. F. Keating, in which various parties claimed an interest in the proceeds of an execution sale of defendant's goods.

For appellant, *A. Leo. Weil* and *C. M. Thorp*.

For appellee T. A. Gillespie, *J. S. & E. G. Ferguson*.

For appellee Hoffman Bros. & Co., *Frank Whitesell* and *William W. Whitesell*.

Opinion by McCOLLUM, J. Filed February 15, 1897.

We agree with the learned court below that the sale was not made on the Western Electric Company's writ. The auditor did not find that it was, but he said "presumably it was advertised on all the writs." The sheriff's return showed a sale on the Gillespie writ, but it did not show a sale on the writ of the Western Electric Company. The evidence on this point was that the sheriff refused to sell on the latter writ without a bond of indemnity; that the bond was furnished to him, and that before the sale he surrendered it to the company. The fair inference from this evidence is that the company abandoned its purpose to sell, and determined to rely on its levy. It offered no explanation of the surrender of the bond, nor evidence to show that the sale was made on its writ. As this writ was issued on a judgment obtained after the assignment for the benefit of credits was made the sheriff was justified in refusing to sell upon it without indemnity. The assignment being valid passed the title to the property to the assignee subject only to the antecedent liens. If there were no such liens upon it a seizure and sale of it on a writ issued on a subsequent judgment would have subjected the sheriff to a liability to the assignee for the full value of it. We think that under the circumstances the supposition of the auditor that the sale was on all the writs was unwarranted. On this point Judge WHITE agreed with his associates, although he dissented from the decree because it did not give the fund to the assignee for the benefit of creditors. It may also be stated in this connection that they agreed with him and the auditor that if the liens of the prior levies were lost by the laches of the sheriff the fund should be awarded to the assignee. Were the liens so lost? Certainly not as against the defendant in the judgment at whose instance and for whose accommodation the sale of the property was postponed. The execution creditors had no part in the postponement and there was no taint of actual fraud in it. It was the act of the sheriff based on the solicitation of the debtor, and intended to enable the latter to pay his debts without a judicial sale of his property. Prior to the assignment the execution creditors might have complained of the delay and possibly have instituted proceedings to put an end to it, but no one else could. After the assignment and the sale of the property the general creditors were in a position to claim the fund upon proof that the levies were collusive and fraudulent as to them. But no general creditor could acquire priority over the others by issuing an execution and levying upon the

property after a valid assignment for the benefit of all the creditors had been made and the property had passed under the control of the assignee. This is precisely what the Western Electric Company seeks to do. Its contention is that the fund realized by the sale belongs to it or to the prior execution creditors, and its effort is to postpone the latter for its exclusive benefit. No general creditor as such is contesting the validity of the levies made on the Gillespie and Hoffman writs or the claims of the plaintiff in them to the fund.

The evidence is clear and convincing that the executions issued before the assignment were delivered to the sheriff with directions to make the money upon them; that these directions were not countermanded or modified by the parties, and that they were repeated more than once by the plaintiff in the first execution. The plaintiffs in the executions are thus exonerated from responsibility for the delay in making the sale, and if they lose by it their loss is chargeable to the sheriff's disregard of their positive instructions. No case has been cited which can be justly likened to the one before us, or which furnishes a clear warrant or precedent for the decree contended for on this appeal.

In *Farle's Appeal*, 13 Pa. 482, the court found from the evidence that the plaintiff "did not put his execution in the hands of the sheriff with a *bona fide* intent that he should proceed and make the money according to law." In *Weir v. Hale*, 3 W. & S. 285, it was the arrangement between the first execution creditor and the defendant which was adjudged to give the subsequent executions priority. These cases are plainly distinguishable in their facts from the case at bar. That they have not been considered heretofore as overruling *McCoy v. Reed*, 5 Watts, 302, is shown by *McGinnis v. Prieson*, 85 Pa. 116, in which it was said that "an execution will not be postponed for the officer's default. His procrastination even by the sufferance of the creditor is not fraudulent *per se* and postpones only when the creditor directs him not to proceed." In the case now under consideration the auditor's findings of fact, approved by the court, furnish an adequate basis for the decree appealed from, and they appear to be well sustained by the evidence.

The Western Electric Company is not in the position of an execution creditor having a levy before the assignment. It does not dispute the validity of the assignment, and it has acquired by its levy no priority over the other creditors, or standing to contest the preceding levies. Whatever rights it had respecting these levies were those of a general creditor and exercisable under

the assignment. In *Missimer v. Ebersole*, 87 Pa. 109, it was held that there could be no valid levy made on a writ issued after the assignment.

The specifications of error are overruled.

Decree affirmed and appeal dismissed at the costs of the appellant.

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

WHITE et al. v. SMITH et al.

Where a parochial school has been founded and maintained and still is maintained by the voluntary contributions of the members of the congregation which owns the school, and said school being free to all, without regard to sex, color or religion, without pecuniary charges of any kind, no revenue whatever being derived therefrom, and being in relief of the public burdens: *Held*, that said school is a purely public charity, and exempt from taxation under the Act of May 14, 1874.

Where a building, called a convent, was used simply as the residence for the Sisters of Mercy, who taught said school, and where said house was also built by the voluntary contributions of said congregation for the express purpose of a residence for said teachers, and was so used and occupied; was close to the school house and part of the school-property plant. *Held* said residence was necessary for the more efficient operation and management of the school, come within the principle decided in *County of Northampton v. Lafayette College*, 128 Pa. 132, and was exempt from taxation under said Act of May 14, 1874.

No. 206 Dec. T.; 1893. In Equity. Bill to enjoin the collection of taxes, etc.

Opinion by COLLIER, J. Filed March 27, 1897.

On the 28th day of September, 1893, plaintiffs filed their bill, setting forth that St. Peter's Roman Catholic Church Congregation of McKeesport owns a certain lot of ground on Market street, extending between Seventh and Eighth avenues of said city; fronting 230 feet on Market street and running back to Blackberry alley; and that on this lot are erected a church, a free school and a convent; which said buildings have been erected from time to time by said congregation from the voluntary contribution of its members.

That said school is a free school, founded and maintained by the voluntary contributions of the members of said congregation, that no tuition is charged any scholar, and the school is open to all such scholars as may wish to attend, without regard to race or religion.

That no revenue is or has been derived by said congregation from either said convent or school.

That said convent was erected by said congregation on said school lot from the voluntary contributions of its members, and is maintained in the same way; that it was built for and has

been used as a residence for the teachers in said school who are Sisters of Mercy, and that said teachers receive said residence furnished as a part compensation for their services, in addition to annual salary made up by the voluntary contributions of the members of said congregation.

That the city of McKeesport levied an assessment for city and school purposes against said convent and a lot fronting 70 feet on Market street by 140 to Blackberry alley, on which said convent stands; and that said city threatens to levy upon and sell plaintiffs' personal property, the furniture in said convent, to satisfy said tax claim.

On the 13th day of February, 1896, the defendants filed an answer denying that a free school was erected on said lot, or that the buildings on said lot were erected by said congregation from the voluntary contributions of its members.

2d. Denying that "said school is a free school, founded and maintained by the voluntary contribution of the members of said congregation; no tuition is charged any scholar, and the school is open to all such scholars as may wish to attend, without regard to any race or religion."

3d. Denying that "said convent was erected by said congregation on said school lot from the voluntary contributions of its members, and is maintained in the same way. It was built for and has been used as a residence for the teachers of said school, who are Sisters of Mercy. Said teachers receive said residence furnished as a part compensation for their services; in addition, they receive an annual salary, made up by the voluntary contributions of the members of said congregation."

4th. Denying that "no revenue whatever is or has been derived by said congregation from either said school or said convent."

5th. Denying that said school or convent are institutions of public charity and exempt from taxation.

All other allegations in the bill are admitted in the answer.

FINDINGS OF FACT.

1. We find from the uncontradicted testimony that the school building on said church lot was erected and paid for by the voluntary contributions of the members of the congregation, that it was founded and is maintained as a free school, to give a common school education to all children, without regard to their creed, sex, race or color; that no charge is made for tuition, and that no revenue whatever is derived from it. All expenses are provided for by voluntary contributions.

2. That the convent building on the same lot, separated from the school building by only

22 feet of ground, was built for and is used as a residence for the teachers of the school, of which the average attendance is from 700 to 750 scholars.

This clearly appears from the evidence, particularly that of Mr. White, a large contributor:

"Q. How long do the sisters use that residence? A. Well, during the time they are teaching school; from September to about the latter part of June. The balance of the time they are away at their Mother House in Westmoreland county. Q. So that is all that convent was built for and the only way it is occupied, simply as a residence for the teachers of this free school? A. Yes, sir. Q. Does the congregation derive any revenue from either the convent or the school? A. No, sir; none whatever. Q. Did you have anything to do with contributing to the erection of this convent? A. Yes, sir; I contributed ten thousand dollars towards its erection. It cost something more than that—a little more than that. The balance was made up by the congregation."

No revenue is derived from this building. It is part of the school-property plant, and necessary for the efficient operation and management of the schools.

CONCLUSIONS OF LAW.

Whatever is done or given gratuitously in relief of the public burdens, or for the advancement of the public good, is a public charity. Where the public is the beneficiary the charity is public, and where no private or pecuniary return is reserved to the giver or to any particular person, but all the benefits of the gift or act goes to the public, it is a purely public charity: *Episcopal Academy v. Philadelphia et al.*, 150 Pa. 565.

Again, a denominational school property, vested in trustees, for the purpose of affording encouragement to the education of youth is a purely public charity, although the school is not open in the same way to the general public as to persons connected with the religious denomination, but the general public are admitted as vacancies occur, and when admitted, upon the same terms with all other pupils: *Ibid.*

In the present case, the school having been founded and maintained and still maintained by the voluntary contributions of the members of the congregation; and it being free to all, without regard to race, sex, color or religion, without pecuniary charges of any kind, and no revenue whatever being derived therefrom, and being in relief of the public burdens, we hold that it is a purely public charity, and exempt from taxation under the Act of May 14, 1874.

As to the convent building: This building, although called a convent, is, strictly speaking, not a convent, but a residence house for the teachers of the school, who are Sisters of Mercy.

This house was built by voluntary contributions for the express purpose of a residence for the teachers, and is so used and occupied. It is close to the school house, is a part of the school-property plant, and is necessary for the more efficient operation and management of the schools. We think it comes within the principle decided in *County of Northampton v. Lafayette College*, 128 Pa. 132, and is exempt from taxation under the Act of May 14, 1874.

Let a decree enjoining the defendants, etc., be drawn and submitted.

DECREE.

And now, March 30, 1897, this cause came on to be heard upon bill, answer, replication, testimony taken, and was argued by counsel, whereupon it is adjudged and decreed that the property of the St. Peter's Roman Catholic Church Congregation of McKeesport, described in the bill in this case, being a lot on Market street with a frontage of 280 feet, extending back between Seventh and Eighth avenues to Blackberry alley, on which lot is erected a church, a free school and a residence for the school teachers, called a convent, is exempt from taxation as being a purely public charity. It is further ordered and decreed that the preliminary injunction heretofore issued in this case be made final, and that defendants be perpetually restrained from collecting or attempting to collect any tax assessed, or that may hereafter be assessed against the property of plaintiffs described in the bill in this case so long as the same is used for the purposes of a purely public charity as is now done. Defendants to pay the costs of this case.

By the Court.

For plaintiffs, *Marron & McGirr.*

For McKeesport School Dist., *E. P. Douglass.*

For city of McKeesport, *T. C. Jones.*

Orphans' Court.

In re Estate of EMMA F. ADAMS, Deceased.

Testator directed his land to be sold and the proceeds divided among his children. He then provided that if any of the children should die without issue the share of such should go to the survivors. *Held* the legacies vested absolutely.

The children elected to take the land without conversion, and partition was had by proceedings in equity. *Held*, that if they did not have the absolute title under the will, the partition vested in them.

No. 183 Dec. T., 1896. *Sur* appeal from the assessment of collateral inheritance tax.

OVER, A. J.
STATEMENT.

The appellants claim that they take title to the real estate assessed with the collateral tax, not as heirs of the decedent, their sister, but under the will of their father, John Adams, and that therefore it is not subject to the tax. He gave his wife a life estate in his real estate, and directed his executors to sell it after her death; and in the sixth clause of his will divided the proceeds into six shares, giving one to each of his six children, Sarah Jane Bonfield, Rebecca Bailey, John W. Adams, Harriett Brown and Emma F. Adams, this decedent. In the seventh and tenth clauses he provided as follows:

Seventh.—It is my will that if any one of the children aforesaid should die without issue the share of such child shall go to and be vested in his or her surviving brothers or sisters. It is also my will that no one of the husbands or wives of the aforesaid children shall have any interest in or control over the property hereby bequeathed, but that the shares of my said children shall belong to them separately and exclusively, whose receipts therefor shall be deemed and taken as a full discharge to my executors.

Tenth.—It is also my will that if my two daughters now single or either of them shall marry before the payment of her or their distributory share in my estate they or either of them shall have the same control of their respective shares that is given to my daughters already married, and their receipt or receipts to my executors shall have the same force and effect as is provided for in this will in regard to my married daughters.

He also made the following codicil to his will:

I, John Adams, of the township and county aforesaid, add the following as a codicil to the foregoing will: It is my will and desire that if my two single daughters should remain single they shall have the power to dispose of their distributory share or shares by will or otherwise as they may deem proper, and Rebecca's name having been inadvertently omitted in the original draft, I hereby direct my estate to be divided into seven instead of six shares.

After the death of the widow by deed dated June 1, 1875, executed by all the legatees, they elected to take the land directed to be sold as land, and by decree in equity in partition Emma F. Adams' portion was allotted to her, her heirs and assigns in severalty. She sold a portion and purchased other land in Braddock with the proceeds, and died September 20, 1896, unmarried, intestate and without issue, leaving as her heirs brothers and sisters, and lineal descendants of deceased sisters who are the appellants. The only property she left consisted of the unsold part of her portion of her father's estate, the land in Braddock, all of which has been assessed for collateral tax, and some personalty.

OPINION. Filed March 26, 1897.

There can be no question that the gift to the children of John Adams was absolute in the first instance, and that the will worked a conversion of the land into personalty; but this is immaterial, as there is no distinction made in the construction of the words "died without

issue" in devises and bequests: *Morrison v. Truby*, 145 Pa. 540. In that case it was held "that it is a settled rule of construction that when a bequest of personalty is made absolutely in the first instance, and it is provided further that in the event of death, or death without issue of the legatee, another legatee or legatees shall be substituted, such provision shall be taken to mean death without issue in the testator's lifetime." If, however, it clearly appears from the whole will that the testator meant a definite failure of issue, and intended to limit the gift over, if the legatee survived him and died without issue, his intention must govern.

Appellants contend that the tenth clause and codicil to the will show such an intention. In the seventh clause he made an attempt to create a separate use trust for his married daughters; and in the tenth, his intention evidently was to have it apply also to his single daughters when they married. It is probable that he supposed the provision in the tenth clause might restrict their right to dispose of their distributive shares if they remained single. To remove all doubt he then in the codicil gave them power if they remained single to dispose of their shares by will or otherwise; thus expressly manifesting his intention that they should have absolute dominion over the shares given them. As there does not appear to be anything in these provisions of the will, or any others indicating that the testator intended that the gift over should take effect if the legatees survived him and died without issue, the legacies vested in his children absolutely at his death. It is evident that this is the construction given to the will by the parties themselves. In the deed by which they agreed to take the land without conversion it was stipulated that it "shall be held by the said children and heirs of said John Adams, deceased, their heirs and assigns, as real estate;" treating their interests there, as well as in the partition proceedings, as absolute. The decree in partition provided "that the titles to the parts respectively be vested in severalty in the parties, their heirs and assigns, to whom the same have been allotted as aforesaid." So that even if Emma F. Adams, the decedent, did not have the absolute title under the will the proceedings in partition and decree therein vested it in her: *Herr v. Herr*, 5 Pa. 428.

The appellants are also estopped by the deed executed by them from denying her title. It follows therefore that they take title to the land as her heirs; and the appeal must be dismissed.

For the Commonwealth, *R. B. Scandrett* and *T. C. Noble*.

For appellant, *H. M. Scott*.

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PITTSBURGH, PA., APRIL 14, 1897.

Supreme Court, Penn'a.

YOST v. DWELLING-HOUSE INSURANCE COMPANY, Garnishee.

SANDS v. SAME.

An agreement in an insurance policy to submit questions disputed to arbitrators to be afterward agreed upon is revocable at any time.

Real estate was devised A. to be his forever, but without the right to sell it until he became thirty years of age. *Held*, that this is not such a condition as to avoid a contract of insurance in which it is stipulated that A. is the unconditional owner.

Testator devised a piece of land to A. to be his forever. There were also certain annuitants provided for in the will. In another part of the will he provided that on the death of his heirs herein named all property and bank stock was to be sold and divided among all the heirs, and if A. died without heirs his estate to be divided *pro rata* among the heirs. *Held*, that this last clause did not include the real estate previously devised to A.

A condition in a devise of real estate that the property shall not be sold until the devisee attains the age of thirty years is good.

Appeals of the Dwelling-House Insurance Company, garnishee, from judgments of the Court of Common Pleas No. 3, of Allegheny county, in two separate actions, one by William Yost, and the other by J. D. Sands.

The policy of insurance, in this case contained the following provision :

"In the event of disagreement as to the amount of the loss the same shall be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their difference to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expense of the appraisal and umpire."

The facts of the case are stated in the charge of the court, McCLUNG, J., as follows :

"In this case you are trying actions which are somewhat complicated, but your duties are not complicated if you manage to catch the meaning of the court, the explanation which we will give to you. Practically, the only question which you have to pass upon is the cash value

of this property at the time the fire occurred, that is, whether it was worth as much as \$3,000. If it was worth more than that, if you are satisfied of that, it is not necessary that you should go further, because you cannot find that there was more than \$3,000 in the hands of the company subject to the attachment. If you find that the cash value was worth more than that, then you need not go beyond that; if you find it was worth less—the defendant saying it was only worth \$2,600—if you find, for instance, it was only worth that, then your verdict would be to the effect that there was in the hands of the defendant company, subject to the attachment, some \$2,600; and if you find that it was worth more than that, up to \$3,000, you so state. You will not, in any event, find that there was more than \$3,000 in the hands of the defendant company, because that is the entire amount of the policy.

"You understand that John D. McKee's property was insured by this company, and that it was burned down, and that afterwards an execution attachment was issued by two of John D. McKee's judgment creditors, and these issues are between those judgment creditors, and the insurance company, upon that attachment. That is, they are attempting to convince you that the entire amount of this policy was in the hands of the company and subject to these attachments. You are, therefore, trying two cases but you are simply ascertaining what amount is due upon this insurance policy. You will take up each case by itself. You will take, for instance, the case of William Yost against the Dwelling-House Insurance Company, and after ascertaining what amount is due upon this policy, you will find that there was in the hands of the defendant company, subject to attachment, at the time of this writ, the amount that you find due upon the policy. You will, in addition, find whether or not the original judgment, that is, the judgment of William Yost against J. D. McKee, was wholly unpaid. It is the uncontradicted evidence here that it was; and you should, in addition, in that case, find that the writ of attachment in the other case, to wit: J. D. Sands against the Dwelling-House Insurance Company, No. 628 November Term, was issued and served on the defendant company simultaneously with the writ in this present case. Your verdict in the other case will just be a counterpart of that verdict; that is, finding that the writ in the Yost case was served simultaneously with the writ in the case in which you are finding the verdict. I think, probably, it would be better for me to put that verdict in shape, leaving the only blank neces-

sary to fill up. I will give you the form of verdict, leaving only the proper blanks to be filled up.

"The other questions in the case are as to whether or not, under the terms of the policy, the plaintiff here, the insured in the policy, was entitled to recover anything until he had first ascertained the amount of the policy by means of an arbitration. The undisputed testimony is that an arbitration was demanded of him. We instruct you, for the present at least, that he was not bound to submit to an arbitration, and that there can be a recovery here notwithstanding the fact that that amount has not been so ascertained.

"There is another point raised to the effect that he did not take under the will of his grandfather, by which it is admitted that he took title to the property, such title as is required by the terms of the policy; that is, that his was not the sole and unconditional ownership. We instruct you also, for the present, that this is not a good defense; that he did have such title. So that it leaves to you, as the only disputed question, as I said before, the question as to whether or not there was sufficient value in that property to absorb this policy, and if not, what was that value? I have prepared the verdicts, and you will fill up the blank, either by inserting \$3,000, the amount of the policy, or inserting as much less as you find the cash value of that property at the time of the fire to have been. To the cash value of the property you may add interest from the time at which it should be paid. That is the highest amount you can find, if you find \$3,000 and interest from the time it should be paid. If you find it was less, of course you can add interest to whatever amount you find. I have prepared forms of the verdict which, if you find to be correct, you may submit, filling up the blank that is left for the value of the property."

A verdict having been rendered in favor of the plaintiff in each case, these appeals were taken.

For appellant, *Samuel J. Graham* and *Willis F. McCook*.

Contra, *William Yost*.

Opinion by MCCOLLUM, J. Filed January 4, 1897.

The refusal of the insured to comply with the condition in the policy in regard to the appointment of appraisers to ascertain the amount of the loss in case of a disagreement concerning it, does not constitute a good defense to this action. The condition was nothing more than an agreement to refer to three appraisers to be appointed

at a future time, to determine the amount of the loss by the award of any two of them. It was a revocable agreement, and the insurance company is in no position to complain, here or elsewhere, of the revocation of it. It has not shown that it admitted the validity of its policy or its liability under it, but on the contrary it has, in the language of the learned judge of the court below, "always denied its liability on ground which, if sustained, cut up the contract by the roots." The foregoing views are fully warranted and sustained by the decision of this court in *Mentz v. Ins. Co.*, 79 Pa. 478. In *Assurance Co. v. Hocking*, 115 Pa. 407, it was distinctly held in an opinion by Mr. Justice CLARK, that where an agreement to arbitrate does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be eventually chosen by the parties, it is revocable by either party. Further consideration of this branch of the insurer's contention is deemed unnecessary because the cases cited furnish a sufficient answer to it.

Another defense to the action is that the interest of the insured in the property destroyed was "other than unconditional and sole ownership," and this depends on the construction of the will by which he acquired title to it. The property destroyed was a dwelling house included in the devise by David McKee of his homestead to John D. McKee "to be his forever for his own proper use," subject only to a restriction of alienation until he attained the age of thirty years, which in his case was for the period of thirteen years. In *Jaureche v. Proctor*, 48 Pa. 466, WOODWARD, C. J., said: "A partial restriction such as not to alien to a particular person or for a limited time, may be supported, but a general restraint of alienation when annexed to an absolute estate, is void, upon the familiar principle that conditions repugnant to the estate to which they are annexed bind not." This is in accord with the view expressed by TILGHMAN, C. J., in *McWilliams v. Nisly*, 2 S. & R. 507, and by COULTER, J., in *McCullough v. Gilmore*, 11 Pa. 370. It is said in 6 Am. & Eng. Ency. of Law, 877, note 4, that "the weight of authority seems to be against such restraints, however limited as to time." The ground on which a partial restraint of alienation is supported is that it is not inconsistent with a reasonable enjoyment of the fee: *McWilliams v. McNisly*, *supra*, and *Libby v. Clark*, 118 U. S. 250. While the cases on this point are conflicting, the Pennsylvania cases we have cited seem to sustain a partial restraint of alienation. But we may assume that the restriction

in question is valid without conceding that it relieves the insurer from liability on its policy. The conditions of the policy are to be understood not in their technical sense, but as requiring that the insured be the actual and substantial owner: Beach on Insurance, sec. 405. The risk was not affected by the restriction. It was not inconsistent with a reasonable enjoyment of the estate devised and the insured was the actual, sole and substantial owner of the property destroyed. For the reasons above stated, the restriction in question cannot be regarded as affording a defense to the action.

It is contended, however, that if the insured by the devise to him of the homestead, acquired an estate in fee-simple it was by another provision of the will defeasible on his death under thirty years of age without issue. The provision referred to is preceded by the devise of the homestead, by gifts of annuities, to the brothers, sisters and children of the testator, and by the appointment of executors. It is as follows: "On the death of my heirs herein named all property and bank stock to be sold and divided among all the heirs should my grandson John D. McKee die before he is thirty without having any heirs his estate to be divided *pro rata* among the heirs." We have quoted it entire and as it was written. It is quite clear that by "my heirs herein named" the testator meant the annuitants, and that "all the heirs" included John D. McKee. It is also obvious that "all property and bank stocks" did not include the homestead previously devised in fee. The part of the provision which relates to the division of John D. McKee's estate may be fairly referred to his share of the proceeds of the property previously directed to be sold. It may be possible to construe it as including the homestead, but it seems to us that this is not the reasonable interpretation of it. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention: *Sheetz's Appeal*, 82 Pa. 213. "Where there is a clear gift in the will it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down:" 2 Jarman on Wills, 443. Applying this well settled rule of construction to the will under consideration, we hold that there is nothing in it which clearly indicates that it was the intention of the testator to defeat or modify his devise of the homestead. There is no other question raised by the specifications

which requires discussion. All the specifications are overruled.

Judgment affirmed.

CLAYTON ELECTRIC CO. v. MCKEESPORT
& WILMERDING RAILWAY CO.

Where a contract for the construction of an electric street railway contains a condition that the roadbed shall be "excavated and prepared," in the absence of anything further explanatory on the face of the instrument, the defendant may show by the testimony of experts the meaning of the words used in the contract as applied to the roadbed.

Appeal of the McKeesport and Wilmerding Railway Company, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* wherein J. Clayton Miller, H. C. Johnston and Chas. H. Miller, partners doing business as the Clayton Electric Company, were plaintiffs.

The facts of the case developed at the trial, before WHITE, J., were as follows: The plaintiffs and defendant executed a contract whereby the former was to construct an electric railway for the defendant between McKeesport and a point in the borough of Wilmerding, Pennsylvania. Among other specifications in the contract, it was agreed that the plaintiffs were to furnish "at their own proper cost and expense all the necessary materials, labor, tools, etc., to construct, build and complete in a good and substantial and workmanlike manner an electric railway, between the city of McKeesport and the Pennsylvania Railway station, in the borough of Wilmerding, over and upon the roadbed excavated and prepared by the railway company."

The defense was tardiness in beginning and prosecuting the work and that a large sum of money had been necessarily expended to put the track in safe and successful condition after it had been laid by the plaintiffs.

The defendant offered expert testimony to prove what the meaning of the term "excavated and prepared," as applied to the roadbed, meant in the contract. The court rejected this offer on the ground that the question was for the court, under the written contract between the parties, and that expert testimony was incompetent. (First and second assignments of error.)

The court charged the jury:—

"I might add one further remark for fear there may be a misunderstanding of it. During the trial I ruled that under the contract the plaintiffs were not bound to ballast the road, if I am wrong in that the Supreme Court will correct me, but the jury must take it as I ruled at

the time; that the plaintiffs could not be charged for not ballasting the road." (Third assignment of error.)

Verdict and judgment for plaintiffs. The defendant took this appeal and assigned error, *inter alia*, as above indicated.

For appellant, *W. B. Rodgers and N. A. Means.*

Contra, Breck & Vaill.

Opinion by McCOLLUM, J. Filed January 4, 1897.

The contract required the plaintiffs to furnish materials for and build, in a good, substantial and workmanlike manner, an electric railway over and upon a roadbed excavated and prepared by the defendant. It called for the construction of a railway in the manner and under the conditions specified therein, and authorized an inspection of the materials and work by the engineers the defendant might employ or appoint for that purpose. The ties to be used in the construction of the railway were to be delivered by the defendant along the line of it. There was no express provision in the contract in regard to ballasting the road. The want of it led to this appeal. The defendant claimed that the plaintiffs were bound by the contract to ballast it, while they claimed and the court held that they were not. The defendant offered to prove, by the testimony of experts, the meaning of the words "excavated and prepared," as applied to the roadbed and used in the contract, but the offer was rejected on the ground that there was no ambiguity in them or arising from their use. These are the rulings of which the defendant complains. It is not denied that it is essential to the construction of a substantial railway that it should be well ballasted. But the court thought that inasmuch as this work was not expressly provided for in any of the plaintiffs' covenants it was not chargeable to them. The court did not expressly say the defendant was bound to do the work, but it said there was nothing in the contract "limiting the defendant to simply excavating and preparing the roadbed." While it seemed to recognize the duty of ballasting the road as imposed by the contract it expressly decided that it was not laid by the contract upon the plaintiffs. It is clear that the defendant was not bound by the contract to ballast the road unless the ballasting of it was included in its covenant to prepare the roadbed. If the defendant was not bound to ballast it we have, under the ruling of the court below, a contract in which neither party is required to do so, although the plaintiffs expressly agreed to furnish the materials and build the

railway in a good, substantial and workmanlike manner and deliver it to the defendant "complete and ready for operation." Manifestly the parties contemplated the construction and completion of a good and substantial railway, and supposed they had contracted for one. All that the contract required the defendant to do was to prepare the roadbed and deliver the ties, while the plaintiffs were required by it to furnish the materials and perform the work necessary to the construction and completion of the railway "ready for operation."

We think the defendant should have been permitted to show by the testimony of experts the meaning of the words "excavated and prepared" as applied to the roadbed and used in the contract. The offer to show it was directly in line with *McDonough v. Jolly Bros.*, 165 Pa. 542.

The specifications of error are sustained.

Judgment reversed and venire facias de novo awarded.

SMITH v. HINE.

Where the reputation of a witness for truth and veracity is attacked it is his reputation at the time he testifies that is in question, and not his reputation prior to the commencement of the suit.

The notes of testimony of the official stenographer taken at a former trial of the same issue, where the witness resided in an adjoining county, are not a deposition, the stenographer not being sworn, and are not admissible under the ninth section of the Act of 1887.

Appeal of J. M. Hine, defendant, from the judgment of the Court of Common Pleas of Indiana county, in a petition to open a judgment by single bill, entered against him by warrant of attorney, in favor of W. R. Smith.

The petition was granted, and on trial of the issues judgment was rendered for the original plaintiff, and petitioner appeals.

The specifications of error were, *inter alia*:

1. At the trial the plaintiff having called C. O. Wachob as a witness, the defendant undertook to impeach him by proof of his general reputation for truth and veracity. The testimony being objected to by plaintiff's attorneys, the court made the following ruling:

"We will confine the inquiry as to the character of Mr. Wachob for truth and veracity prior to the commencement of the trouble about the note. It seems the trouble commenced judicially in court in February, 1894. Mr. Wachob seems to be a party, that is to say he is involved in this proceeding; while not in this particular issue, still, for the purposes of this inquiry, we think he is a party, and we will confine the examination to prior to the trouble about this

note. To which ruling the defendant's counsel ask a bill of exceptions, and one is accordingly sealed."

2. The plaintiff having called H. P. Sandles, a witness, in support of the character of C. O. Wachob, defendant's attorneys, on cross-examination, proposed to ask this witness what his (Wachob's) general reputation for truth in the community is now. This for the purpose of affecting the credibility of C. O. Wachob.

"By the court: For the reasons we gave heretofore on a similar proposition, we overrule this. The proper test is, what was the reputation for truth and veracity prior to the trouble which was the subject-matter of the contention. This is on the principle that the partisan of one side or the other may talk about a man, and it is regarded as unfair in the logic of the law and evidence to affect a man's testimony by the reputation made after the trouble in inquiry had occurred, and we fix a date to this. The proper test, possibly, would be when the trouble commenced. Objection overruled, and bill sealed to the defendant."

8. The plaintiff having shown that John Lewis resided in Westmoreland county, his attorneys asked leave to read the short-hand notes of testimony of John Lewis, taken at the trial of this case, September 25, 1895.

"By the court: The whole intent of our rule of court and practice in this behalf is to take the deposition of witnesses out of the county, unless some special cause be shown. We have the deposition of this party here. The testimony is that he resides out of the county, and we have no power to exclude it.

"Mr. Taylor: We object to the testimony because it is not the kind of deposition which is contemplated by the rules of the court.

"By the court: There couldn't be anything more satisfactory than the testimony of witnesses taken in open court, where there is opportunity for cross-examination. We think it comes within the spirit of the rule relating to the taking of depositions. Objections overruled, and bill of exceptions sealed to the defendant."

For appellant, *Jack & Taylor and William T. Cline.*

Contra, J. N. Banks and Watson & Keener.

Opinion by FELL, J. Filed January 4, 1897.

Generally, when evidence of character is received as tending to establish the innocence of a person charged with crime, the inquiry is limited to the time when, or prior to which, the alleged offense was committed; and the same limitation is observed in civil cases where the character of a party to the suit is an element

to be considered in estimating damages. The character of the accused prior to the charge of crime is often important in determining the question of guilt, and it may of itself be sufficient to create the reasonable doubt which should work an acquittal. When damages are claimed for injury to character, the value of the character alleged to have been injured may properly be considered. In these cases it is character at the time of the alleged offense, or character at the time of the alleged injury, that may be taken into consideration and that may be proved.

When at the trial of a cause the character of a witness is shown in order to affect his credibility the question is whether he then told the truth. It is his character at the time he testifies that is under investigation, and this is to be established by evidence of his general reputation at that time, and not his reputation at a time prior to the commencement of the suit, which may be a period remote from that at which he testifies.

In this case the action came to trial more than two years after the issue had been asked for, and all inquiry as to the reputation of the witness whose character for veracity had been attacked was confined to a period of time prior to the filing of the petition to open the judgment. It does not appear that his connection with the controversy had become the subject of conversation or discussion in the neighborhood in which he lived, and that the reputation testified to was founded upon the expression of partisan opinions by those who had taken sides in the dispute. If this had appeared it might have been considered by the jury in determining the weight to be given to the testimony for and against him, but it would not have been ground for its exclusion. We have not been referred by counsel on either side to any authorities upon the subject, and we are not aware that the question has been decided in this State, but we find that the conclusion which we have reached is in harmony with the decisions in a number of other States: *Mask v. State*, 3 Miss. 77; *Fisher v. Conway*, 21 Kan. 25; *Stratton v. State*, 45 Ind. 468; *Willard v. Goodenough*, 30 Vt. 393.

Under objection the official stenographer of the court was allowed to read his notes of the testimony of a witness taken at a former trial of the same issue. The witness resided in an adjoining county, and the reading of the notes of testimony was permitted on the ground that they were deposition. They were the short-hand notes of the stenographer made during the examination of the witness. They were

not a deposition, and as the stenographer was not sworn they were not "properly proven notes of the examination" as required by the ninth section of the Act of 1887.

The first, second and eighth assignments of error are sustained, and the judgment is reversed with a *venire facias de novo*.

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

BRAGDON v. PERKINS-CAMPBELL CO.

The burden of proof is upon the defendant to establish that the return of a writ which was regularly served, was false in order to set the service aside.

Service of a writ of summons will be sustained when made upon the agent of a company which has no regular place of business in this State, if it appears that the agent who sold to the plaintiff the goods for which suit was brought, opened a salesroom in the hotel where he was stopping, for the time being, and kept there a large number of samples on exhibition and invited trade from the people of the community.

Nos. 136 and 137 April T., 1897. Rule to set aside the sheriff's return.

Opinion by WHITE, J. Filed April 3, 1897.

The sheriff's return to the two writs is: "Served, January 25, 1897, by delivering a true and attested copy of this writ to J. W. Crider, agent for the Perkins-Campbell Company, and made known to him the contents thereof."

On the face of the return that is a good service on the defendant company.

But the defendant company say, that J. W. Crider was not their agent, that they had no office in Pennsylvania, did no business in this State, and their place of business is Cincinnati, Ohio.

The burden of proof is on the defendant to satisfy the court that the return of the sheriff is false; that J. W. Crider was in no sense their agent upon whom service could be made. All the presumptions are in favor of the sheriff's return being good and true.

Depositions have been taken on both sides and submitted to the court. From these it appears that J. W. Crider was the travelling agent of the defendant company for selling its manufactured articles, travelling through various States, and had been selling for some three years in all the large cities of Pennsylvania, receiving a commission on his sales for his services. He had frequently been in Pittsburgh, taking contracts for sales and sometimes selling articles he had with him. He always had one or more trunks, sometimes several, with samples of the goods, which he exhibited in the

salesroom of the hotel where he stopped, sending out cards, hunting up customers, and would generally remain from one to two weeks, thus engaged. On one of his visits he contracted to sell to the plaintiff (Mrs. Bragdon) a lady's saddle, to be made extra strong, which order was sent to the company at Cincinnati, and they sent the saddle to Mrs. Bragdon. The saddle, it is alleged, was very defective, by reason of which she was thrown from her horse, and seriously injured. These suits are to recover damages.

This case is widely different from a mere travelling agent of an insurance company, or one who collects money, or gets subscriptions for a newspaper. Crider was the agent of the defendant company for exhibiting its goods, sometimes having with him \$800 or \$1,000 of stock, sometimes selling what he had, and taking orders. Although the company had no regular or permanent office in Pittsburgh, yet when Crider had the samples spread out in the salesroom of the hotel, inviting and receiving customers there, that was their place of business, for that purpose, and to that extent they were doing business here. The contract for the saddle was made here, with J. W. Crider, agent in that behalf of the defendant company, and through him it was delivered here. As they recognized him as their agent in making the contract, he may well be treated as their agent on whom to serve a writ for a breach of that contract.

Rule discharged.

For plaintiff, *Shiras & Dickey*.

For defendant, *George N. Chalfant*.

Court of Common Pleas No. 3, ALLEGHENY COUNTY.

WASHINGTON et al. v. WHITE et al.

In a factional fight in a voluntary association formed for social and benevolent purposes (in this case a Masonic lodge), being subordinate to a certain grand lodge, the majority of the members of which have severed their masonic relations with the same, and attached themselves to another lodge, owing allegiance to a different grand lodge, cannot take possession of the rooms, paraphernalia and other personal effects of the lodge and turn them over to the second body to the exclusion of the minority who remain loyal to the original lodge.

Prior to 1881 Sheba Lodge No. 66 (Colored Masons) had been subordinate to the Most Worshipful Grand Lodge of Free and Accepted Ancient York Masons for the State of Pennsylvania. In that year, it is alleged, a union was formed between the said grand lodge and the Most Worshipful Grand Lodge of Free and Accepted Masons of the State of Pennsylvania. Sheba Lodge, however, did not go into the union, but remained true to its original superior body, which con-

tinued to exist as a separate organization, notwithstanding the union. *Held*, that after an acquiescence of some fifteen years as a separate organization, defendants cannot now claim the right to carry the property of Sheba Lodge over to the grand lodge formed by the union of the two original grand lodge bodies.

No. 618 May T., 1896. In Equity.

This was a proceeding in equity by Joseph Washington *et al.* claiming to constitute Sheba Lodge No. 66, Free and Accepted Ancient York Masons of Allegheny City, being a subordinate body of the Most Worshipful Grand Lodge of Free and Accepted Ancient York Masons for the State of Pennsylvania, against Calvin White *et al.*, who had been members of the same lodge but who connected themselves with another lodge, subordinate to another grand lodge organization calling itself the Most Worshipful Grand Lodge of Free and Accepted Masons of the State of Pennsylvania; and that said defendants had taken possession of the rooms, paraphernalia and other properties of said Sheba Lodge and refused to allow the plaintiffs the use of the same. Defendants claimed that their taking possession of the said rooms, etc., and excluding the plaintiffs therefrom, was in all respects legal; that prior to 1881 there existed in Pennsylvania two Masonic Grand Lodge bodies, called respectively: "The Most Worshipful Grand Lodge of Free and Accepted Masons of Pennsylvania," and "The Most Worshipful Grand Lodge of Free and Accepted Ancient York Masons." That in that year they were consolidated and formed The Most Worshipful Grand Lodge of Free and Accepted Masons of the State of Pennsylvania, and that defendants, by a majority vote of the lodge, on March 14, 1886, had decided to sever the connection of the lodge from the Most Worshipful Grand Lodge of Free and Accepted Ancient York Masons and attached it to the Most Worshipful Grand Lodge of Free and Accepted Masons. They did not deny that the Most Worshipful Grand Lodge of Free and Accepted Ancient York Masons were still in existence, notwithstanding the alleged consolidation.

For plaintiffs, *Charles W. Dahlinger* and *S. U. Trent*.

Equity is the proper remedy:

Roshi's Appeal, 69 Pa. 467;
Henry v. Dietrich, 84 Id. 291 and 292;
E. E. Reformed Pres. Con. v. Milligan, 40 Pittab. Legal Journal, 7;
Kerr v. Trego, 47 Pa. 292.

The title to the property vests in those remaining after the schism:

Roshi's Appeal, 69 Pa. 468;
Schnorr's Appeal, 67 Id. 146;
Kerr v. Trego, 47 Id. 296;
McAuley et al.'s Appeal, 77 Id. 397;

Krecker et al. v. Shirey et al., 168 Id. 534;
Schlichter et al. v. Kelter et al., 156 Id. 119;
Winebrenner et al. v. Colder et al., 43 Id. 244.

Under the circumstances it was not necessary for the plaintiff to first take steps in the organization itself, before proceeding in equity:

Gorman v. O'Conner, 155 Pa. 239;
Roshi's Appeal, 69 Id. 470.

That church cases apply:

Kerr v. Trego, 47 Pa. 296;
Gorman v. O'Conner, 155 Id. 239.

Defendants' acquiescing in refusing to acknowledge the union, they are now estopped from setting up the fact of the union:

Margut v. U. B. Mutual Aid Society, 148 Pa. 185;
Lehigh, etc., County v. Early, 162 Id. 339;
Allegheny Nat. Bank v. Bailey et al., 147 Id. 111.

For defendants, *C. C. Lee*.

Opinion by *McCLUNG, J.* Filed January 6, 1897.

This contest arises out of a factional fight in a voluntary association formed for social and benevolent purposes. It is alleged as a ground of complaint that the defendants, constituting a majority of a Masonic Lodge, called Sheba Lodge No. 66, Free and Accepted Ancient York Masons of Allegheny, have not only thrown off their allegiance to that body, but have also attempted to take with them into another organization, separate and distinct from the one above named, viz., The Most Worshipful Grand Lodge of Free and Accepted Masons of the State of Pennsylvania, with which they have connected themselves, the regalia and other property of said Sheba Lodge. The defendants do not deny that they have changed their masonic relations, nor that they claim to own and control the property of the lodge, but aver that in perfect consistency with the laws of the organization to which all parties belong, they by resolution severed their relations with the York Masons and attached themselves to the other body.

They admit the right of the minority who refused to consent to this change of relation to join with them in the use of the property in question, provided they join with them in their change of allegiance.

The jurisdiction of equity in such controversies as that thus presented is too well established in Pennsylvania to require discussion.

The sole issue is, are the defendants right in their contention that the proposed change of relationship is constitutional, or are the plaintiffs right in their assertion that it is revolutionary?

Undoubtedly the defendants constitute a majority of the lodge. If they acted within the limits of the laws of the association, and in accordance with its rules, their power is

absolute. If they did not so act, then neither property rights of the plaintiffs nor their lodge relations can be affected by a majority vote, however large. Admittedly, the determination of this question depends upon whether or not defendants, since the passage of the resolution referred to, remain members of the same body as before. They in their answer say: "Said Most Worshipful Grand Lodge of Free and Accepted Masons is not a separate and independent body, but is the same as The Free and Accepted Ancient York Masons, only that the recognition of the former is greater than the latter."

Is this true, or rather is it shown by the evidence to be true?

For the purpose of making good the averment defendants call our attention to *Wolfford's Appeal*, 126 Pa. 47, in which it was found that the two bodies had united in 1881.

This finding was, however, one of fact, and does not affect any one except the parties to the case and those whom they represent. Even if we concede that the various lodges of York Masons were represented in the case by their grand lodge, the case still does not decide that no lodge of York Masons could maintain its independence of the other grand lodge after the union, nor does it decide that several of these lodges could not in case they decline to go into the union maintain an organization under the name of the York Masons.

The testimony here shows that assuming that after 1881 Sheba Lodge was perfectly free to go into the consolidated body, yet it did not do so, and for some fifteen years joined with the other lodges in forming and maintaining an organization under the old name. After acquiescence for this length of time in the maintenance of a separate organization, the defendants cannot now claim the right to carry the property of this organization over to the other one because of the proceedings of 1881.

Nor are they helped out by the fact that the witnesses are not able to explain the distinction between the doctrines or practices of the two bodies. It is sufficient that the property in dispute was acquired and held by an organization which the persons composing it held to be and maintained as, distinct from and independent of, the body under whose jurisdiction the majority now desires to carry it.

FINDINGS OF FACT.

First.—Plaintiffs and defendants together constitute "Sheba Lodge No. 66, Free and Accepted Ancient York Masons of Allegheny City." Said lodge being subordinate to "Grand Lodge Free

and Accepted Ancient York Masons for the State of Pennsylvania."

Second.—That said organization of York Masons has for a number of years existed as a body distinct from and independent of a capital masonic organization called the "Grand Lodge of Free and Accepted Masons of the State of Pennsylvania."

Third.—That whilst maintaining such separate existence said Sheba Lodge acquired the property described in the second and third paragraphs of the plaintiffs' bill.

Fourth.—That the defendants constituting a majority of the members of said Sheba Lodge undertook by resolution to sever its connection with the York Masons and attach it to the other body; and having passed such resolution against the protest of the plaintiff (the minority of said Sheba Lodge) took and maintained control of the hall and other property of said lodge, and are now using said property for the purpose of conducting a masonic lodge in connection with and subject to the jurisdiction of the new organization to which they have attached themselves, and have thus excluded the plaintiffs from the use of said property for the purposes of a lodge of York Masons.

Whilst the defendants have an undoubted right as individuals to throw off their allegiance to the old and attach themselves to the new organization, they plainly cannot as against the protesting minority assume control over the property of the lodge.

Let a decree be drawn enjoining the defendants from interfering with the plaintiffs in the use of the property of said Sheba Lodge and requiring the defendants to pay the costs.

BAIR & GAZZAM v. JARBOE et al.

When subscribers to the certificate made to the Governor for the purpose of obtaining letters-patent creating a corporation under the Act of 1874 falsely certify that ten per centum of the capital stock of the intended corporation has been paid in cash to the treasurer, the persons so falsely certifying are liable in actions of deceit to the particular parties actually misled by the falsehood.

A bill in equity for the joint benefit of the creditors of the corporation cannot be maintained.

No. 54 Nov. T., 1892. In Equity. Exceptions to master's report.

The plaintiffs in their own behalf, and in behalf of other creditors who might join with them, filed their bill in equity against Walter S. Jarboe, D. R. Warden, Thomas L. Shields, John H. Wilson, John G. Hathaway and the National Wrapping Machine Company, alleging that on the 10th day of March, 1888, the said

Jarboe, Warden, Shields and Wilson made an application to the Governor for a charter under the Act of 1874 for a corporation to be called the National Wrapping Machine Company, and that said subscribers certified in said application that ten per centum, being \$30,000, had been paid in cash to the treasurer of said corporation. The bill further set forth in truth said sum had not been paid into the treasury of said corporation, and the plaintiffs upon information and belief averred that not more than \$5,000 of said sum was ever paid in. That the plaintiffs are judgment creditors of the National Wrapping Machine Company in the sum of \$4,281.66, and that the corporation was insolvent and without assets.

The bill prayed that the defendants be decreed to account for the \$30,000, and to pay over to the plaintiffs and other creditors enough thereof to satisfy their respective debts.

The court afterwards allowed an amendment of the bill, which amendment set forth that the defendants knew at the time of making the statement that it was false, and that the plaintiffs were deceived by it. An answer having been filed the case was referred to George P. Hamilton, Esq., as master, who found the allegations of the bill to be true, and recommended a decree in accordance with the prayer of the bill.

Exceptions were filed by Jarboe and Witson.

For plaintiffs, *Shiras & Dickey*.

For respondents, *Johns McCleave*.

Opinion by McCLUNG, J. Filed February 20, 1897.

There is abundant evidence to justify the finding of the master that of the \$30,000 in cash certified to have been paid to the treasurer of the company but \$1,000 was actually paid, and it is also perfectly apparent that the parties who made the certificate knew at the time of making it that it was false.

This \$29,000, if paid in, would have made this company a solvent one, amply able to pay its debts. This statement was made first to the executive department of the State government for the purpose of showing that the parties were entitled to a charter. "After letters-patent have been issued, the statement with all its indorsements must be recorded in the proper county, for the information of the public, in order that the fact of incorporation may be known and the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it." Opinion of WILLIAMS, J., in *Patterson v. Franklin*, 176 Pa. 614.

Under these circumstances, if left to our own devices, we would have been disposed to hold that the parties knowingly and falsely certifying to the possession by the company of this means of paying its debts, should be compelled to make good their certificate so far as possible, by themselves assuming the liability, just as if they had subscribed for stock on behalf of others whom they had no authority to represent, and that being so liable creditors could in equity compel the payment of so much of the fund as would discharge their claims. We would thus have come to the same conclusion as the master, though possibly not by precisely the same course of reasoning. Since the case was argued, however, our attention has been called to the above case of *Patterson v. Franklin*, 176 Pa. 612, which seems to forbid such a conclusion.

The doctrine of that case seems to be that persons so falsely testifying are only liable in actions for deceit to the particular parties actually misled by the falsehood.

That being the law these defendants cannot be held liable in the present proceedings for the \$29,000, or any portion of it, because (1) none of the plaintiffs can testify that they actually examined the certificate and saw that the defendants had signed it; and (2) had they done so, the remedy of such creditors would have been each by an action at law (in deceit), and a bill in equity for their joint benefit cannot be maintained.

The bill can, however, be maintained for the purpose of compelling the defendants to pay their unpaid subscriptions.

Let a decree be prepared in accordance with this opinion.

Orphans' Court.

In re Estate of JOHN H. POSKE, Deceased.

Testator first gave his estate to his wife absolutely, but followed this with a limitation of the gift as to two shares of stock to its use and income for life and a gift over to his daughter, and directed that the remainder of the estate after payment of his wife's debts and funeral expenses should be divided between his four children.

Held, that the widow took the stock for life only and the balance of the estate absolutely.

No. 45 Feb. T., 1897. Audit of administrator c. t. a. account.

Opinion by OVER, A. J. Filed April 7, 1897.

John H. Poske died the 9th day of March, 1882, testate, disposing of his estate as follows: "I give and bequeath to my beloved wife Catherine Elizabeth all my household goods

and furniture and all my real and personal property to be hers forever.

"I give and bequeath to my beloved wife Catherine Elizabeth, the use and income of two (2) shares German National Bank stock, to have and to hold the same to her, for and during her natural life.

"I desire and bequeath upon the death of my beloved wife Catherine Elizabeth, to my beloved daughter Annie Mary, the above named two (2) shares German National Bank stock and to my beloved son Henry William fifty (\$50) dollars, and after paying all just debts and funeral expenses of my beloved wife Catherine Elizabeth, the remainder of all real and personal property I desire and bequeath to my four beloved children, viz: Henry William, Annie Mary, John Diedrich and Henry August and their heirs respectively to be divided in equal shares between them but in case of decease of my beloved wife the division to be made not until Henry August reaches the age of thirty (30) years.

"I do hereby appoint my beloved wife Catherine Elizabeth to be the sole executrix of this my last will and testament."

His estate consisted of two shares of stock referred to in the will, and \$5,527.69 in the hands of A. E. Succop. The widow did not take out letters on his estate, and Succop paid her money as she needed it, leaving in his hands at her death \$3,687.37. This balance was paid to the administrator *c. t. a.* of John H. Poske, deceased, and there remains for distribution, after the payment of debts and funeral expenses of the widow, \$2,096.09, and the two shares of stock. His daughter Annie Mary is now deceased, and her administrator and the administrator of the widow both claim these two shares of stock, and the balance of cash in the hands of accountant is claimed by the administrator of the widow and by the children of decedent. In *Good v. Fichthorn*, 144 Pa. 287, Mr. Justice MITCHELL said: "The true test of the effect of language apparently at variance with other parts of the devise is whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective, the latter rarely, if ever; the first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes." Here the testator first gave his wife his estate absolutely; but im-

mediately expressly limited the gift of the two shares of stock to its use and income during her life, and upon her death specifically bequeathed the stock to his daughter Annie Mary. It is manifest that the testator's intention was to give a smaller estate by reducing the absolute gift of this stock to one for life only; and as this intention does not contravene any rule of law it must prevail. The title in remainder to this stock therefore vested in the daughter, and as she is dead it must be distributed to her administrator. There is, however, no express limitation of the absolute gift to the widow of the remainder of the estate, to a life interest only. The attempt is to dispose of what remains at her death, after the payment of her debts and funeral expenses, so that clearly she had the power to consume it and to claim it upon distribution without giving security: *Hambright's Appeal*, 2 Grant, 320.

The testator's intention seems to have been to make an absolute gift to his wife and yet reserve to himself the right to dispose of what remained at her death; thus attempting to impose a restraint upon the absolute estate previously given by depriving her of the right of testamentary disposition. This intention would contravene the settled rules of law by depriving the widow's estate of one of its attributes and cannot prevail: *Good v. Fichthorn*, *supra*. The question is certainly close and doubtful; but "as an absolute gift, especially of personalty, is not to be cut down by a later clause, unless the testator's intention to modify the gift is unequivocally expressed:" *Pennock's Estate*, 20 Pa. 268, the court inclines to the opinion that the widow took absolutely all of the estate except the two shares of stock. This construction seems to be supported by *Heck's Estate*, 170 Pa. 232, and the numerous cases cited in Judge MCPHERSON'S opinion. There the testator, after giving his daughter a legacy, provided, "That she shall not consume any part of the principal thereof but preserve the same undiminished, and that at her death the said principal sum shall go to the persons entitled under this my will to the real estate herein devised to her for life;" and it was held that this provision was merely precatory and that the legacy vested absolutely in the daughter. The reasons are much stronger here for holding that the gift to the wife was absolute; as the clause which it is alleged modified it, undoubtedly, gave her the right to consume it in her lifetime.

For administrator widow, *R. B. Petty*.

For accountant, *Henry Meyer*.

For administrator of Annie Mary Schademan, *Mark Schmid* and *H. L. King*.

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PITTSBURGH, PA., APRIL 21, 1897.

Supreme Court, Penn'a.

KEATING et al. v. McADOO.

A will which devises certain premises of testator to his daughter in fee, and subsequently provides "if any of my said children shall die without leaving lawful children, the part devised to such child shall go to and be equally divided among my other children, who shall then survive the child so dying without lawful children, and if any of my children die leaving children or a child, then such child or children shall be entitled to the same share of the estate of any of my children who shall die without leaving issue that the parent of such child or children would have been entitled had such parent been alive at the time of the death of my said child so dying without issue," indicates the actual intent of the testator to refer to the death of the daughter in his lifetime.

The words in a will "the estate which I have bequeathed to my said daughters, Rebecca and Martha, shall not be liable to the debts, or subject to the control of their respective husbands," are sufficient to create a separate use trust, and the use of the word "bequeath" confines the trust to the personal property only.

Appeal of John Keating, John T. Cunningham, Robert B. Cunningham, Samuel A. Cunningham, Martha Morrow (nee Keating), John W. Keating, Jos. M. Keating, Mary Keating, Elizabeth Keating and Margaret Keating, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action of ejectment wherein James McAdoo was defendant.

The facts appearing upon the trial, before COLLIER, J., were as follows: The plaintiffs were grandchildren of John Keating, who died in 1884, seized, *inter alia*, of the premises, to recover which this action was brought.

By his will he provided as follows:

"All the rest and residue of my property, real, personal and mixed, in possession, reversion or remainder, I devise and bequeath as follows, to wit: One-fourth part thereof I devise and bequeath to my son Joseph, his heirs and assigns forever; one-fourth part thereof I devise and bequeath to my son John, his heirs and assigns forever; one-fourth part thereof I devise and bequeath to my daughter Rebecca (intermarried with Robert McAdams), and to her heirs and assigns forever; and the other one-fourth part to my daughter Martha (intermarried with Robert Cunningham), her heirs and assigns forever." Then followed: "It is my will that

the estate which I have bequeathed to my said daughters Rebecca and Martha shall not be liable to the debts nor subject to the control of their respective husbands. It is further my will that if my said children should die without leaving lawful children, the part devised to such child shall go to and be equally divided among my other children who shall then survive the child so dying without lawful children. But if any of my children die leaving children, or a child, then such child or children shall be entitled to the same share of the estate of any children who shall die without leaving lawful issue that the parent of such child or children would have been entitled had such parent been alive at the time of the death of my said child so dying without issue."

The property devised was divided by an amicable partition and Rebecca McAdams was given and took exclusive possession of the premises described in the *precipe*.

Having been advised that an estate tail had been created as to her share, Rebecca and her husband, Robert McAdams, executed a deed to bar the same, William Bailey being the grantee in said deed. He conveyed to Robert McAdams, who, later, with Rebecca, his wife, conveyed to John Mellon, from whom by intermediate conveyance the defendant derived his title. Rebecca McAdams died without leaving any children.

The plaintiffs submitted the following points:

"1. That the real estate acquired by Rebecca McAdams under the will of her father John Keating—of which the lot in controversy in this case is part—was taken and held by her subject to a separate use trust and was therefore inalienable, the said Rebecca McAdams, having been, during all the time of her tenure thereof, a married woman.

"2. That the said Rebecca McAdams, having died without leaving any children, the estate vested in her under the will in evidence in this case was thereby determined and the devise over of said property to the surviving brothers and sister of said Rebecca McAdams, and the children of any deceased brother or sister thereupon took effect; whereby the title to the premises in controversy in this case is now vested in the plaintiffs."

"3. That under all the evidence in the case the verdict should be for the plaintiffs."

All of which were refused, which refusal was the subject of the three assignments of error. The court gave binding instructions for the defendant.

Verdict and judgment accordingly; whereupon plaintiff took this appeal.

For appellant, *R. E. Stewart, J. McF. Carpenter and J. M. Shields.*

Contra, A. M. Brown and John D. Brown.

Opinion by MITCHELL, J. Filed January 4, 1897.

The will of John Keating, Sr., begins, so far as concerns this controversy, by a devise of the premises in suit to his daughter in fee, to her "and to her heirs and assigns forever." Is this clearly cut down to a lesser estate in any subsequent clause? The words which are claimed to have that effect are "if any of my said children shall die without leaving lawful children, the part *devise*d to such child shall go to and be equally divided among my other children, who shall then survive the child so dying without lawful children, and if any of my children die leaving children or a child, then such child or children shall be entitled to the same share of the estate of any of my children who shall die without leaving lawful issue that the parent of such child or children would have been entitled had such parent been alive at the time of the death of my said child so dying without issue." This provision it must be observed applies not to his daughter alone but to all four of his children who took by the residuary clause. Under our cases this might be interpreted as meaning either an indefinite failure of issue, thus creating a fee tail, or a death of the devisee in the lifetime of the testator. Recasting the general language of the clause into specific directions as to this daughter, it might be read in this way, "If Rebecca should die without leaving children, her part shall go to Joseph, John and Martha equally if they then survive, but if either Joseph, John or Martha should have died before Rebecca, leaving children, then such children shall take such part of their aunt Rebecca's share, as their parent would have taken if he or she had survived Rebecca." Assuming this to be a fair paraphrase of testator's language as applied to Rebecca's share, it would seem to indicate his actual intent to refer to the death of Rebecca in his lifetime. But if this construction be not adopted then it is clear that the only other alternative fairly open is that of an indefinite failure of issue. It is not material for the present case which view is taken, it is sufficient that there is nowhere any clear manifestation of intent to cut down the fee given to any child surviving him to a life estate.

There remains the question whether the share of Rebecca was subject to a separate use trust. The words are, "the estate which I have bequeathed to my said daughters, Rebecca and Martha, shall not be liable to the debts nor sub-

ject to the control of their respective husbands." The words are sufficient to create a trust if such was the testator's intention. Of themselves they are consistent with such intent but not necessarily demonstrative of it. The testator left both real and personal estate, and included both in the residuary clause, but he did so by the use of both of the technical words "devise and bequeath." And when he indicated his will that his entire estate should be chargeable with the legacies as well as with debts and funeral expenses, he seems to have known that the personal estate would be liable without express words, for he uses only the proper technical term to charge the land, "the estate which I have herein devised to my said children shall be bound and subject," etc. When, however, he came to express his intention in regard to his daughter's share he used the term "bequeath" only. He may have known that a husband at that time took his wife's personal estate absolutely, and her realty only for life, and he certainly knew that personal estate is much more easily taken possession of and spent by a husband than land. But whatever his reason, he used the appropriate term to confine the separate trust, if any, to the personal property, and his use of technical words throughout the will is so uniformly accurate as to indicate either knowledge on his part or the assistance of counsel with such knowledge. With this fact so plainly before us we should not be justified in saying that he used the word "bequeathed" in any other than its proper and restricted sense. If this view be thought to savor of technicality, it must be remembered that the subject is technical, and there is no equity in plaintiff's claim to induce a disregard of technicality in order to sustain their present action, against the evidence of their own conduct by deeds of partition, proceedings to bar entails, sales of land and making of titles, for nearly fifty years. Their claim has no merit either in morals or in law.

Judgment affirmed.

TAYLOR'S ESTATE.

Appeal of BIRCH and ROWLAND, Guardians.

An action was commenced for personal injuries, and continued after plaintiff's death from the injury, by her administrators. The Supreme Court held that they had a right to continue the action, and the administrators settled with the defendant; and, on its insistence that all pending actions against it on account of the injury be disposed of, guardians of the children, who had brought an action for the same cause, joined with the administrators in releasing the defendant from all further liability. *Held*, that the guardians were entitled to no part of the proceeds, there being no compromise of their claim, which the previous decision had held invalid.

Appeal of T. F. Birch and J. W. Rowland, guardians of the minor children of Mary V. Taylor, deceased, from the decree of the Orphans' Court of Washington county, confirming the auditor's report and determining the distribution of the balance in the hands of the accountant.

The account of the executors of the decedent was referred to an auditor, who thus found the facts:

"The account of the executor shows a balance due him of \$1,269.25, and by note 'A' appended thereto he acknowledges to have in his hands the sum of \$5,234, as the net proceeds of a compromise of two suits brought against the P. C. & St. L. Railway Company for the purpose of recovering damages on account of the injury sustained by this decedent and her subsequent death at the hands of said company. The exceptions related entirely to the question as to whether or not the executor should have charged himself with this amount, it being agreed at the hearing before the auditor that any exception looking to a surcharge of a larger amount than this net balance of \$5,234, would be waived by the exceptants, and the question for the determination of the auditor was simply as to a surcharge to that extent.

"Mary V. Taylor, the decedent, was injured upon the road of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., on June 29, 1892. On August 25, 1892, she brought an action of trespass against said company to recover compensation for the injuries alleged to have been sustained by her on account of said accident. She died March 29, 1893, leaving surviving her three minor children, to wit: Mary V. Taylor, George A. Taylor and Edith O. Taylor. By her last will and testament T. F. Birch, Esq., the accountant, and J. W. Rowland, were appointed the executors of her estate, and these same gentlemen were also appointed by this court as the guardians of the above named children.

"After her death the above named executors had the same suggested upon the record and themselves substituted as plaintiffs in the action brought by her; and on February 3, 1894, Birch and Rowland, as guardians of the above named minor children, brought a second action of trespass against the said railway company to recover damages on account of the death of Mrs. Taylor. The action brought by Mrs. Taylor was to No. 58 of November Term, 1892; and the action subsequently brought by the guardians of her minor children was to No. 169 February Term, 1894.

"After the substitution of the executors as

plaintiffs in the suit brought by Mrs. Taylor, an amended statement was filed by them which alleged that her death was caused by and the result of the injuries she received on the said 29th day of June, 1892. To this statement a demurrer was filed by the defendant company upon the ground that the right of action did not survive the plaintiff. The Court of Common Pleas of Washington county sustained the demurrer so filed and an appeal was taken by the plaintiffs to the Supreme Court of the State, which reversed the court below and held that "The right of action for death given by sec. 19, of the Act of April 15, 1851, as amended by sec. 1 of the Act of April 28, 1855, is conditioned upon the concurring facts, that the injured party's death was occasioned by said violence or negligence, and that no suit for damages was brought by him. The first section of the Act of 1855 was not intended to dispense with either of said conditions. It merely designates the persons who, in connection with the widow, and in lieu of the personal representatives, shall thereafter be entitled to exercise the statutory right of action, and recover damages for the death. In other respects, there does not appear to be any express or implied repeal or modification of the 18th and 19th sections of the Act of 1851."

"The question raised before the Supreme Court in the above case, which is reported in 165 Pa. 339, was whether the suit brought by Mrs. Taylor during her lifetime abated at her death or was continued for the benefit of her estate; and whether the railway company was liable in that action under the provisions of the Act of April 15, 1851, and also liable in the subsequent action brought by the guardians under the provisions of sec. 19 of said act, and the Act of April 28, 1855. In the opinion of the auditor the conclusion reached by the Supreme Court is that the company continued liable under the original suit brought by Mrs. Taylor during her lifetime, and that the suit brought by the guardians of her minor children after her death was improvidently brought, and no recovery could be had thereon.

"After the rendition of the decision in the above case a compromise was reached between Birch and Rowland, as executors of Mary V. Taylor, deceased, and as guardians of her minor children, by which the defendant company paid to them the sum of \$7,500 in full satisfaction of all claims for damages on account of her injury and death, and it is the balance of this sum, after the deduction of attorneys' fees, costs and expenses, which the accountant says is in his hands, and which he says he is advised 'should be retained by T. F. Birch and J. W.

Rowland as guardians of Mary V., George A. and Olive E. Taylor, minor children of the decedent.

"The auditor is of the opinion that the decision of the Supreme Court not only reinstated the original suit brought by Mary V. Taylor during her lifetime, but in effect nullified the second action brought by Birch and Rowland as the guardians of her minor children, and that the entire sum paid by the railway company in compromise and settlement of these suits in reality passed into the hands of Birch and Rowland as executors, and formed part of her estate in their hands liable to all claims of creditors thereon. He has, therefore, sustained the exceptions and surcharged the accountant with the sum of \$5,234.

Exceptions to this report were filed by the guardians, that (1) the auditor erred in surcharging accountant with the sum of \$5,234, the net balance of the compromise with the railroad company, said sum being damages for injuries resulting in the death of the parent, should be paid to exceptants, guardians of her surviving children; and (2) the said sum of \$5,234, being the amount received in compromise of two suits against the railroad company, the one in behalf of the executors, and the other in behalf of the guardians, the auditor erred in surcharging accountant with the whole amount thereof.

These were dismissed by the court in the following opinion:

"And now, September 26, 1896, these exceptions, submitted on briefs of counsel, after consideration thereof; the exceptions are dismissed and the report of the auditor is confirmed absolutely. [Our view being that the action begun by Mrs. Taylor in her lifetime and the decision of the Supreme Court in *Birch et al., Executors, v. Railway Co.*, 165 Pa. 339, fully warrants the awarding of the fund in controversy to the creditors of the deceased.]"

The guardians of the minors took this appeal, and assigned as error the action of the court, especially as evidenced by the words in brackets above.

For appellant, *T. F. Birch.*

Contra, T. Jeff. Duncan.

Opinion by WILLIAMS, J. Filed January 4, 1897.

This appeal from the Orphans' Court brings up the same question that was considered and decided on an appeal from the Court of Common Pleas of Washington county by the same appellants and reported in 165 Pa. 339. We there held that the 18th section of the Act of April 15, 1851, was neither repealed nor modified by the

Act of April 26, 1855; and that an action instituted to recover damages for personal injuries caused by negligence on the part of the defendant survived the injured party and could be prosecuted to final judgment and satisfaction by the personal representatives of the deceased plaintiff.

It was also held in the same case that the right of action for the death of a person injured by negligence or violence of another given by the 19th section of the same act was conditioned upon two concurring facts. First, that the death of the injured person resulted from the violence or negligence complained of; and second, that no suit had been brought by the party injured to recover damages in his lifetime. That case disposes of this appeal so far as the main question is concerned.

Mrs. Taylor was injured in a railroad accident in June, 1892. Some time after she brought an action against the railroad company to recover damages for the injury she had received. Pending this action she died in March, 1893. Her administrators were duly substituted as plaintiffs, and proceeded with the action, but before it was reached for trial the defendant made an offer to compromise, which was accepted by the administrators with the assent of all parties interested in the prosecution of the claim. The sum of seven thousand five hundred dollars was the amount agreed upon to be paid and received in full satisfaction of the plaintiff's demand. Prior to the decision of *Birch's Appeal*, 165 Pa. 339, the guardians of Mrs. Taylor's children had brought an action against the railroad company on the behalf of their wards, claiming the right to recover notwithstanding the action brought by Mrs. Taylor herself, to which her administrators had succeeded. The decision in *Birch's Appeal* was fatal to this contention and determined that under the Act of 1851, as also under that of 1855, the company was liable to but one action for the recovery of damages for the same injury to the same person. The action begun by the injured person having survived her, and the right to prosecute the same to "final judgment and satisfaction" having been vested in her administrators, the damages suffered as the result of the injury were recoverable in that action and in that alone. The railroad company, however, insisted, as part of the settlement, on the disposition of all pending actions against it on account of the injury received by Mrs. Taylor, and the guardians accordingly joined the administrators in releasing the company from all further liability. As they had no claim to release their joinder was a matter of form merely.

It was superfluous. No right of action in them was extinguished by it, and it was perfectly clear that no interest, several or undivided, in the money paid to the administrators was acquired because of it. But it is suggested that their joining in the release at the request of the railroad company may be treated as the compromise of a doubtful claim and that on this ground some part of the money paid should be awarded to them. There is, however, no evidence tending to show a settlement with the guardians or the payment to them of a price in consideration of their release. They joined in the release to enable the administrators to conclude a settlement, and they well knew at the time that they had no valid demand against the company. It had been so held in *Biroh's Appeal*, already referred to, and the testimony shows that no attempt was made to compromise with them. It will be unfortunate for the wards of the appellants if creditors shall absorb the estate of Mrs. Taylor, their mother, but under the Acts of 1851 and 1855 the money received by the administrators in settlement of their action is assets for which they must account on final settlement.

The assignments of error are overruled and the judgment or decree appealed from is affirmed.

BOEHM v. GLOECKNER et al.

In the trial of an issue *devisavit vel non*, where the evidence shows that the testator gave instructions as to the disposition of his property, which was put in the form of a will and signed by him in the presence of subscribing witnesses, and that after the signing of the will he gave verbal instructions as to the disposition of a mortgage and life insurance policy which he said he did not want put in the will, and when at his request there was no provision to cover what had been agreed upon in relation to his living with his brother, who was the chief beneficiary under the will, there is not sufficient evidence to justify the finding of a jury that he did not understand the writing or that he did not intend it to be his will.

Appeal of Benedict Boehm, plaintiff, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an issue *devisavit vel non*.

The facts are sufficiently set forth in the opinion of the Supreme Court, *infra*.

The errors assigned were, *inter alia*, the refusal of the court to affirm the following points:

8. That the paper offered as the last will of Leo Boehm, deceased, is an absolute disposition of the whole of his estate, both real and personal, and if the jury believe the testimony of Benedict Boehm and Ulrich Rittenger, that Leo Boehm, at the time he made the will, only intended to give to Benedict the house in which he, Leo, lived and the furniture in it, then the paper offered is not the last will of Leo Boehm, and

the verdict should be for the defendants. *Answer:* If you find, from all the evidence in the case, that Leo Boehm only intended to give to Benedict the house and the furniture in it, then the point is affirmed. Bill for plaintiff and defendants.

4. If the jury find that Leo Boehm executed the alleged will for the purpose of giving Benedict Boehm the house and the furniture in it, upon the conditions named in the paper, and upon the further conditions that Benedict was to take charge of Leo and his house, and take care of him and keep him while he lived, and that Benedict consented to the arrangement, it was a contract or bargain that took effect in the lifetime of Leo Boehm and not a will, and the verdict should be for the defendants.

For appellant, *J. S. & E. G. Ferguson and Henry Meyer*.

Contra, Levi Bird Duff and L. B. D. Reese.

Opinion by FELL, J. Filed January 4, 1897.

The issues of fact certified to the Common Pleas for trial were (1) whether, at the time of signing said paper writing, the said Leo Boehm had testamentary capacity; (2) whether there was undue influence used to procure the execution by the said Leo Boehm of said paper writing; (3) whether the said Leo Boehm had a full understanding of the nature of said paper writing, and of the disposition contained therein; (4) whether the said Leo Boehm executed said paper writing with an understanding and a purpose that it should be his last will and testament, or a writing to take effect presently. The verdict was for the defendant, and the jury returned as special findings that Leo Boehm had at the time of the signing of the paper testamentary capacity, and that there was no undue influence used to procure the execution thereof by him, but that he did not have a full understanding of the nature of the writing, and the disposition contained therein; that he did not execute it with the understanding and purpose that it should be his last will, but with the understanding that it should take effect presently.

In form and substance, the writing is a will. It is drawn with the strictest formality. It is called a last will and testament. It provides for the payment of debts and funeral expenses, and for the disposition of the testator's property after his death. It appoints an executor. It revokes all former wills. It is signed, sealed and witnessed as and for the last will and testament of Leo Boehm. If such a writing as this, found to have been executed by a man possessed of full testamentary capacity, and subjected to no undue influence is to be set aside on the ground

that he did not have a full understanding of its nature and did not execute it for what it purports to be, and for what it on its face is,—a will,—it should be on very clear evidence.

The last three special findings of the jury can be sustained only by proof, sufficient to overcome the writing itself, that it was the intention of Leo Boehm and his brother to enter into a contract for the support of Leo by the brother during his life, and that the writing was intended to express this agreement, but, in fact, contained only a part of it. This is substantially the contestant's claim, but we find nothing in the testimony upon which it can stand. There were three witnesses examined upon this subject,—Ulrich Rittenger, who wrote the will; Lorenz Manz, a friend of the testator, who was called in to witness its execution; and Benedict Boehm, a brother, who is the chief beneficiary. There is no conflict in their testimony as to what led up to and took place at the execution of the will. The important facts are briefly these: Leo Boehm died March 28, 1893, unmarried and without children. His surviving relatives were his brother, Benedict, three sisters, and the children of two deceased brothers. His property consisted of a house and lot on Penn avenue, worth about \$5,200, and personal property appraised at \$3,600. His will was written and signed August 1, 1893. His wife had died 11 days before. Twice during the week following her death, he told his brother, Benedict, that he desired to make a new will, and he requested Mr. Rittenger to write it for him. On August 1st he sent a messenger to Mr. Rittenger, requesting him to come to his house that day to write his will, and to bring Benedict with him. When they came, Leo told them he wanted his will written, and that it was his intention to leave his house and furniture and personal effects to Benedict, on the condition that he should pay \$300 to each of five relatives named, and to expend \$500 in the erection of a monument. He stated his reason for so doing to be that he wanted the title to his house to continue in the family name; that he was alone, and in ill health, and wished to close the house, and live with his brother, on whose kindness and attention he might become dependent. Benedict then declined to advise him about the will, and told him that he would be satisfied if the estate were left to the church or charities, and left the room. Leo then, alone with Mr. Rittenger, gave him directions as to the will, and Rittenger wrote them down in German. At the suggestion of Mr. Rittenger, Leo called Benedict into the room, told him what disposition he intended to make of his

estate, and asked him if he would act as executor. Benedict agreed to act as executor, but suggested that the five legacies of \$300 to be paid by him were too small, and requested that they be increased to \$500 each, in order that there might be no dissatisfaction. To this Leo at first objected, saying that the property might depreciate in value, but he finally consented; and after Benedict had withdrawn from the room, the will was written in English by Mr. Rittenger, from the memoranda before made, and without change except in the amounts of the legacies. Lorenz Manz, a subscribing witness, and Benedict, were called into the room, and in their presence the will was read by Mr. Rittenger to Leo, first in English, and then translated line by line into German. It was then signed and witnessed, and left with the testator, and it remained in his possession until a short time before his death, when he removed to his brother's house, and handed him the will, with other papers, to put in the safe.

Before the will was written, Leo Boehm was asked by Mr. Rittenger if he wished a provision put into the will to cover what had been said about his going to live with Benedict, and being supported by him; and he replied that he did not; that the conversation on the subject had nothing to do with the will; and that it was to contain only the provisions as to the payment of legacies. After the will was signed, Leo spoke to his brother of a mortgage of \$2,000, and an insurance certificate for \$1,500, which he owned, and expressed a desire that the amount of the mortgage should be distributed to friends and charities named by him, and that the amount realized from the insurance should be used by Benedict to pay the expenses of his funeral, and as a fund to keep his grave in order, but said he did not want this put in the will, as he could trust his brother to do what was right. Under this testimony, there could be no proper finding that he did not understand the writing, or that he did not intend it to be his will.

These conversations between the brothers before and after the signing of the will are the basis of the claim by the contestants that the writing was intended as an agreement between them. Some of the witnesses spoke English very imperfectly, and it is exceedingly difficult to determine from the confused mass of testimony just what did take place, and the order of the events. At the hearing before the Orphans' Court for an issue, the witnesses failed utterly to distinguish between general conversations which took place before and after the will was written and the distinct and specific directions

as to what it was to contain. This distinction was made by them at the trial of the case in the Common Pleas, not as clearly as if they had been familiar with the language in which they spoke, but with sufficient clearness, we think, to remove all doubt from the subject. There is, at least, no testimony which, as against the writing itself, will sustain a finding that it was not a last will and testament. It was prepared by direction of, and executed by, a man possessed of full testamentary capacity, and subjected to no influence whatever. He understood its provisions, and intended it to be his will. In name, in form, and as a disposition of his estate to take effect after his death, it is a will, and the jury should not have been permitted to have found otherwise. The learned judge instructed the jury that there was no sufficient evidence of undue influence. He should have gone further, and affirmed the plaintiff's third and fourth points.

The assignments of error are sustained, and the judgment is reversed.

PITTSBURGH v. MAXWELL.

Where six separate lots on the same street are assessed for the same improvement, the owner cannot, by appealing from the assessment as to four of the lots, suspend proceedings to collect the assessments against the other two.

Appeal of Ada P. Maxwell from the judgment of the Court of Common Pleas No. 3, of Allegheny county, entered in discharging a rule to show cause why a municipal lien should not be stricken off.

The facts of the case as set forth in the petition for the rule, and appearing from the record, were that after the grading and paving of O'Hara street, in the city of Pittsburgh, the city applied for the appointment of viewers to assess the cost and damages under the Act of 1891. The report of viewers was filed and confirmed *nisi* on September 28, 1895. On October 23, 1895, Ada P. Maxwell, who was the owner of six several pieces of ground, abutting on said street, appealed from the award of the viewers and demanded a jury trial on the question of damages. Pending this appeal, the court on motion of the city attorney, confirmed the viewers' report absolutely. Subsequently Mrs. Maxwell petitioned the court to vacate the decree of confirmation because her appeal on the award of damages was undetermined. After argument the decree was vacated as to the petitioner without limitation. The city filed its lien for the cost of the improvement in this case. When this had been done, Mrs. Maxwell moved the court to strike off the lien on the ground

that it was prematurely filed by reason of her appeal for damages to her property on said street, remaining untried and undetermined. At the argument on this motion, the court held the decree vacating the confirmation of the viewers' report to apply only to the particular pieces of property involved in the question of damages, and that the report was confirmed as to all others. Defendant then appealed, assigning this action as error.

For appellant, *Charles A. O'Brien*.

Contra, *T. D. Carnahan* and *Clarence Burleigh*.

Opinion by DEAN, J. Filed January 4, 1897.

The appellant is the owner of six separate and distinct lots of ground fronting on O'Hara street, in the city of Pittsburgh. The city, by proper ordinances, graded, paved and curbed the street under Act of 1891, then had viewers appointed to assess damages and benefits. Assessments were made against Mrs. Maxwell, of benefits, of what amount, or on what particular lot or lots of those she owned, nowhere appears from the assessment itself, in either of these paper-books; the report of viewers is not printed, nor even abstracts from it, which would give us the required information in so important a particular; it does appear, that the report was confirmed *nisi* on September 28, 1895. But Mrs. Maxwell appealed from the assessment made by the viewers, and demanded a jury trial. The appeal and decree thereon are not printed; whether she appealed from assessment of damages and benefits, on any particular lot or lots, we do not know from the appeal itself. On June 2, 1895, the city filed a lien claiming the sum of \$1,825, with interest, against all that certain lot of ground, beginning on east side of O'Hara street, at the corner of Elmer street, thence along said O'Hara street 201.71 feet, to the corner of Holden street, and thence extending back 153.12 feet to an alley. The claim, as expressed in the lien is for "grading, paving and curbing O'Hara street, from Fifth avenue to Pennsylvania railroad, which was assessed against the property by report of viewers confirmed absolutely January 2, 1896."

On July 24, 1896, Mrs. Maxwell presented her petition to the court, praying that the lien be stricken from the record, on the grounds that on April 21, 1896, the confirmation absolute had been vacated because of her pending appeal, and therefore as to her, the filing of a lien was premature; that the city must await the event of her appeal. Thereupon, the court granted a rule on the city to show cause why the lien should not be stricken off. To this the city

made answer, that by an inspection of the record of the appeal, it appeared that Mrs. Maxwell appealed only as to two certain lots of her property, 641 and 645, fronting 65 feet on O'Hara street, and extending back 100 feet, upon each of which was erected a two-story dwelling house; that petitioner now sought to have the order vacating the confirmation apply to all her property, those lots as to which the assessment was not appealed from, as well as to those that were. After hearing the court on September 15, 1896, discharged petitioner's rule, filing no opinion. The effect of the decree is to leave petitioner's property, lots 641 and 645, subject to the municipal lien. From this decree she appeals.

We are left in the dark as to the reasons for the decree. The court probably found as a fact from the record, that the appeal and demand for jury trial, were as to some other of the six lots than two against which the lien is filed. We think this probable, because appellant nowhere states, either in his history of the case, or argument, that the appeal and demand for jury trial, were as to the assessments made against all the lots, while the city distinctly avers in its answer to the rule, that no appeal was taken from assessment against these two. But "a judgment is not to be reversed at random or for suspicion of error. Where it may be erroneous or not according to the existence of circumstances which do not appear, every intendment of fact is to be made in support of it." *Gram's Appeal*, 4 W. 44. On the assumption then that the grounds of the decree were that no appeal was taken as to these two lots, the question raised is whether the owner of six lots on some street, assessed for the cost of the same improvements, can by appealing from the assessment as to four of them, suspend the city's proceeding to collect the assessments on the two not appealed from until the event of the appeal. Appellant argues, that must be the necessary consequence, and for this view is cited *Appeal of Pennsylvania Steel Company*, 161 Pa. 571. But that case is not in point. There, the Court of Common Pleas appointed viewers to assess damages for the opening of a street, who filed their report, awarding the steel company \$3,550 for land taken. When the report of the viewers was filed, the steel company filed exceptions, and also on the same day took an appeal to the court for a jury trial. As to the exceptions the court below ruled they all raised questions of fact to be determined by a jury and overruled all but one. Treating this as a final decree, the company appealed to this court and made application to Justice THOMPSON, in vacation, for an order suspending proceedings while the appeal

was pending; it was ordered that all proceedings be stayed until court had passed on the appeal from the decree overruling the exceptions. Thereupon, the city of Harrisburg moved in this court to quash the appeal of the steel company, and set aside the order of Justice THOMPSON, on the ground that the decree overruling the exceptions was not final, therefore, no appeal lay from it. This court, the present chief justice rendering the opinion, held the decree was not final and the appeal therefrom was premature; that there could be no final decree until after the event on the appeal by the steel company to the Court of Common Pleas from the assessment by the viewers. In the course of the opinion the chief justice says: "That appeal is still pending and undetermined in the court below. It involves, among other things, the determination by jury trial of the amount of damages to which the steel company is entitled for property taken, injured or destroyed; unless the proceeding should prove to be so fatally defective as to require its dismissal without consideration of the case on its merits there cannot, in the nature of things, be a final decree in the case, until the question of damages is settled by the verdict of a jury."

Appellant's counsel relies on this language to sustain his present appeal; as will be seen from the facts, it does not touch his case. The land taken from the steel company was in one tract, and damages awarded in the lump for the land taken. Of course there could not "in the nature of things," as stated by the chief justice, be a final decree until the verdict of the jury on the appeal determined as a question of fact the amount of damages. But the appeal as to four of these lots in no way affects the benefits assessed against the two unappealed from; whatever may be the event of the appeal, the amount of benefits assessed against the two is not diminished. The only possible effect is, that if in her appeal as to the other lots, she is successful in largely diminishing the assessment against them, her ability to pay the lien on the two will be increased. That is a contingency which can have no place in our determination of this contention.

The decree of the court below is affirmed and the appeal dismissed.

Court of Common Pleas, WESTMORELAND COUNTY.

SUTER v. FINDLAY.

A verdict was for the plaintiff subject to the reserved question of law, "Whether there is any evidence that would entitle the plaintiff to recover in this case."

Held, that the reservation is in proper form, the whole question being whether the case required submission to the jury.

A. obtains judgment against B., May 6, 1890. B. sells his real estate to C. and the deed is recorded April 2, 1891. On a *sci. fa.* to revive A. obtains judgment against B., March 2, 1895, and issues an *alias sci. fa.* against C., the *terre-tenant*, on November 13, 1895. *Held*, that it is too late to bind the *terre-tenant*.

No. 275 May T., 1895. Rule for judgment on point reserved.

Opinion by DOTY, P. J. Filed January 30, 1897.

I believe this case is in shape for final determination. The verdict was in favor of the plaintiff subject to this question of law reserved: "Whether there is any evidence that would entitle the plaintiff to recover in this case."

The question was reserved in this form on the authority of *Newhard v. P. R. R. Co.*, 158 Pa. 418. The case of *Yerkes v. Richards*, 170 Pa. 346, where a similar reservation is condemned, was not discovered until after the trial. In the latter case no reference is made to *Newhard v. P. R. R. Co.*, *supra*, and it is not reversed, unless the two cases necessarily conflict. As we read them, the cases are essentially different. In *Yerkes v. Richards*, "the case depended on questions of fact, which were for the exclusive consideration of the jury." While in *Newhard v. P. R. R. Co.*, the whole question was whether the case required submission to the jury. In affirming the judgment, DEAN, J., says: "Nor is there any reason why the judge, if he have doubt, in the hurry incident to a jury trial, should not reserve for further consideration whether there is any evidence which would entitle the plaintiff to recover, or whether there is any evidence of a fact essential to recovery." There is therefore no conflict between the two cases cited. If we simply look at the language of the question reserved, and see that in one case it is approved and that in the other case a question reserved in the identical language is condemned, there appears to be contradiction. But when we examine the circumstances out of which these questions arise, the cases are not inconsistent. In *Yerkes v. Richards*, the reservation was improper because the case necessarily involved the questions of fact. In *Newhard v. P. R. R. Co.*, a reservation in identical language was approved because it embraced the controlling matter in the case. The matter could be as well considered in the form of a reserved question as if binding instructions were given, as was the case in *Long v. Penna. R. R. Co.*, 147 Pa. 344; or if the court had refused to take off nonsuit, as was done in *Moore v. Phila., W.*

& B. R. R., 108 Pa. 349; or if the question had come up on a request for binding instructions, as in *Del., L. & W. R. R. v. Cadow*, 120 Pa. 568. The case in hand, in this respect, is similar to *Newhard v. P. R. R. Co.*, *supra*. I have considered this phase of the case at some length, in order to be satisfied that it is in shape for final determination. It is true there is no exception to the reservation, and it was with consent of counsel. If in any doubt about the form of reserved question, a new trial would be granted, rather than judgment on the verdict, without regard to the merits, as would be justified by *Headley v. Renner*, 129 Pa. 542. But I am convinced that the form of the reserved question can be sustained.

The undisputed facts are as follows:

1. The original judgment against William F. Findlay was entered May 6, 1890, at No. 337 May T., 1890, in the sum of \$498.20.
2. The judgment in the sum of \$642.68 was revived against William F. Findlay on March 2, 1895, by amicable *scire facias*, at No. 275 May T., 1895.
3. The defendant conveyed the land bound by the lien of the judgment to his wife, Catharine E. Findlay, by deed dated December 20, 1890; the deed was acknowledged March 6, 1891, and duly recorded on April 2, 1891.
4. On November 13, 1895, an *alias scire facias* upon the original judgment was issued to the same number and term as the amicable *sci. fa.*, to wit, No. 275 May T., 1895, with notice to Catharine E. Findlay, *terre-tenant*.

The defense is that the lien of the judgment against the land conveyed was lost before the *alias scire facias* was issued. The contention of the plaintiff is that the period of five years, during which the lien of the judgment continues, only commences to run in favor of the *terre-tenant* from the time she placed her deed on record.

If we have a clear view of the facts, it will not be so difficult to apply the principle which controls. These facts are essential: The original judgment was entered May 6, 1890; the deed to Catharine E. Findlay was recorded April 2, 1891; the judgment was revived by amicable *sci. fa.* on March 2, 1895; the *alias sci. fa.* on the original judgment was issued on November 13, 1895.

This statement ought to dispose of the matter. The lien of the original judgment did not extend beyond May 6, 1895; the *alias sci. fa.* was issued upon this judgment after the lien was gone. It is an answer to the *scire facias* on this judgment to say that time has destroyed the lien. The plaintiff replies that the judg-

ment was revived by an intermediate *scire facias*; the revival was by amicable *scire facias* against the original defendant after the deed to the purchaser had been recorded and without notice to her. The whole question is: Was the lien by such amicable revival continued against the *terre-tenant*?

The principle is stated in 3 Trickett on Liens, § 235, as follows: "A judgment on an amicable *scire facias* to revive between the plaintiff and defendant, to which the *terre-tenant* is not a party, will not revive the lien as against the *terre-tenant* who is in possession or whose deed is on record." It is further said in section 236: "When the deed of the *terre-tenant* is on record at the time of the attempted revival, the *scire facias* to revive must name him as *terre-tenant*; otherwise, the lien will be lost in five years from the rendition of the judgment sought to be revived. The same result will follow, the deed being on record, if the revival is attempted by an amicable *scire facias* which the *terre-tenant* has not signed." If this language of the text embodies the correct principle, it is decisive of the case. The lien of the original judgment expired before the *alias scire facias* issued, and the attempted revival by amicable *scire facias*, to which the *terre-tenant*, whose deed was on record, was not a party, would not continue the lien against the land of the *terre-tenant*. Although there is some apparent conflict, the weight of authority sustains the text. If the deed of the *terre-tenant* is recorded, the plaintiff is bound to take notice of the fact, and thereafter, upon the revival of the lien of his judgment, to give the *terre-tenant* notice: *Lyon v. Cleveland*, 170 Pa. 618; *Armington v. Rau*, 100 Id. 165.

But if there is any uncertainty under the authorities, the matter is settled by the Act of June 1, 1887, P. L. 289, which provides as follows: "And no proceeding shall be available to continue the lien of said judgment against a *terre-tenant* whose deed for land bound by said judgment has been recorded, except by agreement in writing, signed by said *terre-tenant* and entered on the proper lien docket, or the *terre-tenant* or *terre-tenants* be named as such in the original *scire facias*." The *terre-tenant's* deed was recorded before revival by amicable *scire facias* to which she was not a party. The proceeding was therefore not available to continue the lien; and as the lien of the original judgment is lost, there can be no liability of the *terre-tenant* in this proceeding. The validity of the Act of June 1, 1887, is recognized in *Searight's Estate*, 163 Pa. 217.

Numerous authorities are cited by plaintiff's

counsel. We have examined them all most carefully, but fail to discover any one which justifies judgment against the *terre-tenant*. The case of *Fursht v. Overdeer*, 3 W. & S. 470, holds that "a judgment may be revived against a *terre-tenant* at any time within the period of five years, notwithstanding there may have been an intermediate revival by *scire facias* without notice to the *terre-tenant*." But the case goes no further, and therefore does not help the plaintiff. The *sci. fa.* undoubtedly would lie on the original judgment, notwithstanding the intermediate revival, but the trouble here is that the writ of *sci. fa.* did not issue "within the period of five years." To the same effect is *Little v. Smyser*, 10 Pa. 881, the case, however, holding that the *sci. fa.* to revive may issue on the original judgment or on the judgment entered on any intermediate *sci. fa.* But the *sci. fa.* issued on a judgment good against the *terre-tenant*, the purchase having been made three months after the said judgment was entered and the *sci. fa.* issued within the five years. *Zerns v. Watson*, 11 Pa. 281, is also cited by plaintiff, but we see no comfort to be derived from this case. The case is authority that the *sci. fa.* now on trial could not be maintained on the judgment by amicable revival against the original debtor alone, obtained after the title of the *terre-tenant* had accrued. It was necessary therefore, as was done here, to issue the *sci. fa.* on the original judgment. But this case recognizes that this could only be done "at any time within five years from its rendition."

The other cases mainly relied on are *Porter v. Hitchcock*, 98 Pa. 628, and *Hughes v. Torrence*, 111 Pa. 618. That these cases have no application is clearly pointed out in *Baum v. Custer*, 22 W. N. C. 145. The facts of the latter case are very like the case in hand. The principle there laid down is certainly applicable here, and we are bound by the adjudication.

Under the clear weight of authority and under the plain terms of the Act of June 1, 1887, the *terre-tenant* is not bound by the amicable revival to which she was not a party, and the *alias scire facias* to bring her in is too late after the expiration of the lien of the original judgment.

And now, January 30, 1897, after due consideration, judgment on the question reserved for Catharine E. Findlay, *terre-tenant*, *non obstante veredicto*. As to the other defendant, William F. Findlay, judgment on the verdict.

For plaintiff, *Robbins & Kunkle*.

For defendants, *D. C. Ogden and D. G. Albert*.

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PITTSBURGH, PA., APRIL 28, 1897.

Supreme Court, Penn'a.

WALL v. THE ROYAL SOCIETY OF GOOD FELLOWS.

In an action upon a benefit certificate the affidavit set up that in the application for certificate the applicant made certain answers to questions, in one of which he stated, "I have no habit or injury or disease which will tend to shorten my life," and also stated that none of certain classes of his relatives had ever been affected with consumption or certain other diseases. The affidavit further alleged that these answers were false in that the applicant was affected with a pulmonary disease at the time he made the statement, and that prior thereto certain relatives of the applicant had died of the diseases mentioned in the question. *Held*, that under this affidavit the defendant could not only show that the applicant had consumption, but that if at the date of his examination he had any disease tending to shorten his life or any of his relatives of the classes named had died of the diseases mentioned in the question, the beneficiary named in the certificate could not recover.

Where an allegation in an affidavit of defense is that the applicant has made fraudulent answers to questions in the application, the answer may show that a negative answer to a question as to whether applicant had been attended by a physician within a certain time was untrue, though that particular question is not alluded to in the affidavit and it is not proposed to confine the proof to attention on account of the disease from which, in the affidavit, the applicant is said to have suffered.

An amended affidavit of defense may be made so as to correspond with the proof where the proposed amendment merely enlarges or makes more definite the statement of the affidavit.

Appeal of the Royal Society of Good Fellows, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of *assumpsit* brought by Ellen J. Wall upon a policy of insurance.

The affidavit of defense filed was in part as follows:

"On October 15, A. D. 1892, Edmund Francis Wall, son of said plaintiff, made application to Karma Assembly No. 277, located at Pittsburgh, Pennsylvania, of said defendant order, for membership therein (a true copy of said application being hereto attached as part of this affidavit). That the said Edmund Francis Wall in his said application for membership in said defendant order, made certain statements, express stipulations, agreements and conditions,

and warranted that all his statements in said application, and the answers to certain questions, are true as follows, viz:

"I am temperate in my habits, have no habit, or injury, or disease which will tend to shorten my life; and now in good health, and able to gain a livelihood.

"I do hereby warrant that the statements in this application are true and correct, and consent and agree that any untrue statement made above or to the medical examiner, or to the financial secretary, in answer to the questions given below, or any concealment of facts by me in this application, or in my answers to any questions aforesaid, or in my medical examination, or my suspension from, or voluntarily severing my connection with the society, shall forfeit the rights of myself and my beneficiaries, family, next of kin, or dependents, to all benefits and privileges therein or therefrom.

"I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules and usages of the society now in force, or which may hereafter be adopted by the same.

"This application is made and signed by me upon the express condition on my part, that, neither will I claim any benefits or privileges in your society, nor shall my beneficiary herein named, or whom I may hereafter name, in the manner provided by its laws, be entitled to any benefits from the society, until after I shall have been admitted to membership in due form, in accordance with its laws and constitution, nor unless all the statements herein made by me are strictly true; nor, further, unless all answers given by me in my medical examination, as to my habits, physical condition, personal and family history, shall be strictly true; my medical examination to be duly approved by the medical examiner-in-chief before my admission to your society. I hereby accept notice of the fact that no subordinate assembly, or any officer or member of the society, has power or authority to waive conformity to and performance of the requirements of said laws, rules and usages, and I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any physician from disclosing any information acquired attending me in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever, and for myself and for any person accepting or acquiring any interest in such certificate, authorize and request any such physician to testify concerning my health and physical condition."

"That subsequently, on November 28, Anno

Domini 1892, said defendant order issued to said Edmund Francis Wall, its beneficiary certificate No. 23320, dated at Boston, Mass., November 28, Anno Domini 1892, . . . wherein it agreed in consideration and upon condition that the statements made by him in application for membership in said assembly, and statements certified by him to the medical examiner, be made a part of the contract, and the terms, conditions and stipulations in his application being complied with as therein set forth, that the said Edmund Francis Wall was entitled to participate in the widow's and orphans' benefit fund of the said order to the amount of two thousand (\$2,000) dollars, to be paid at his death to said Ellen J. Wall, his mother, the said plaintiff.

"This deponent further avers, that said Edmund Francis Wall did not make true statements and answers in his application for membership, either in his application, or in his answers to certain questions to the medical examiner, but in fact, did make false, fraudulent and untrue answers in said application and in answer to certain questions to the medical examiner. That said applicant did also conceal certain facts relating to his personal and family history. That the following statement in his application was not true, viz: 'I have no habit, or injury or disease which will tend to shorten my life, and am now in good health.' Said statement was untrue, false and fraudulent in this, that the said Edmund Francis Wall, at the time of making the same, was afflicted with and had phthisis with lung and bronchial trouble, and which caused his death by phthisis with pulmonary disease, November 16, 1893, and for which he had been previously treated and did shorten his life.

"That said Edmund Francis Wall did make false, fraudulent and untrue answer to the following question asked him by the medical examiner, at his medical examination made November 14, 1892, as follows, the said question being: 'Have any or either of your parents, brothers, sisters, grandparents, uncles, aunts or cousins, been afflicted with consumption?' To which the answer of said Edmund Francis Wall was: No. Which said answer was false, fraudulent and untrue in this; that his aunt, Johanna Hickey, died in 1890 with consumption and pulmonary trouble; also that his cousin, Thomas Hickey, son of said Johanna Hickey, died in July, 1892, with tuberculosis, at the home of said Edmund Francis Wall; also that his cousin, a Miss Wall, a daughter of said Johanna Hickey, who was also living at his home at the time he made said answers, was in the last stages of consumption, and who died within

several months thereafter; also, that his brother William, having been examined in the summer of 1892, and prior to his application, by a physician, was found to have tuberculosis, was advised to go to another climate on account of his disease, and did go to either Colorado or California; also, that his brother James was examined in the summer of 1892 by a physician and found to be afflicted with tuberculosis, and was also advised by said physician to go to another climate, and did go to St. Francis, Florida. That said Edmund Francis Wall did not disclose, but concealed all facts as to consumption by his aunt, cousins and brothers.

"That said Edmund Francis Wall, in his medical examination, was asked by the medical examiner, 'Have you ever been subject to or had any of the following disorders or diseases, as to whether he had consumption,' he made answer, 'No,' which answer to said question was false, fraudulent and untrue, in that there was and did exist at the time in his physical condition and personal history the fact of existing and continued lung trouble, and in his family history the fact of pulmonary diseases or consumption, with many of his near relatives stricken and suffering and resulting in death, as above more specifically already set forth."

The defendant submitted, *inter alia*, points which, with the answers thereto, were as follows:

5. "If at the date of the application by Edmund F. Wall, October 15, 1892, he was not in good health, or at the date of his medical examination, November 14, 1892, there was anything in his physical condition tending to shorten his life which was not distinctly set forth in his application or in his answers to the medical examiner, or if at the date of his examination, November 14, 1892, any of his parents, brothers, sisters, grandparents, uncles, aunts or cousins, had ever been afflicted with consumption or with pulmonary or hereditary disease, the plaintiff cannot recover." *Answer*: "This point is refused, as it goes entirely beyond any defense set up in the affidavit of defense. If it be understood to be limited to the grounds of defense alleged in the affidavit, then it would be affirmed, but it is stated much too broadly." (Third assignment of error.)

6. "Edmund F. Wall having on November 14, 1892, stated to the medical examiner in answer to the question, 'When last attended by a physician?' 'One year ago,' if the jury find from the evidence that he was attended by Dr. S. L. Wiggins on February 8, 1892, May 2 and 12, June 15 and 22, October 1, and November 3, 1892, or at any other date within one year before

November 14, 1892, the plaintiff cannot recover."

Answer: "This point is affirmed, if you find that the said Edmund F. Wall had at any time within one year previous to the time of his medical examination been attended by a physician for phthisis or lung, bronchial or pulmonary disease, the affidavit of defense having limited this branch of the defense to the allegations that the deceased had been attended by physicians for trouble of this nature." (Fourth assignment of error.)

After the points had been argued, the defendant made the following motion:

"The plaintiff and defendant having rested their case, and it having been disclosed by the testimony of Dr. Wiggins on behalf of the defendant, without objection, that he had treated Edmund F. Wall in the months of October and November, 1892, and prior thereto, for catarrh, and that disease was of such a character that it tended to shorten life, counsel for defendant move the court to amend their affidavit of defense so as to accord with the proof of Dr. Wiggins in this: That he had treated Edmund F. Wall for catarrh in February, May, June and October, 1892, and on November 3, 1892. This testimony being desired for the purpose of showing the falsity of the question propounded to Edmund F. Wall in his medical examination, to wit: 'When last attended by a physician and for what cause.' *Answer:* 'One year ago.'"

The court: "The affidavit of defense as filed alleges that the deceased had, within the period referred to, been treated for lung and pulmonary troubles, and it being alleged by the defense that he died subsequently of lung and pulmonary trouble, any evidence going to show the existence of those troubles at the time of, and prior to, his application would have been admissible, and any evidence as to the existence of a disease which tended to develop into consumption, if such tendency was established by evidence, would have been admissible, and as they have gone to trial, and the case has been tried upon that theory, we decline to allow the amendment." (Seventh assignment of error.)

Verdict and judgment for plaintiff. The defendant took this appeal and filed assignments of error, *inter alia*, as above indicated.

For appellant, *S. A. Will* and *Lev. McQuiston*.

Contra, Watterson & Reid.

Opinion by GREEN, J. Filed January 4, 1897.

While it is perhaps correct to say that the defendant's second and fourth points should have been affirmed without qualification, we do not feel that a reversal on the first and second as-

signments would be warranted. *Prima facie*, at least, the qualifications were correct, and they were harmless in any event, are not sustained.

The third assignment is much more serious. The answer to the fifth point was a flat refusal, though accompanied by the statement that if the point had been limited to the grounds of defense alleged in the affidavit it would have been affirmed. According to this the refusal of the point was erroneous if the matters of fact which are embraced in the point are included in the affidavit of defense. An examination of the affidavit convinces us that the matters embraced in the point are covered by the affidavit, and that the point should have been affirmed. The affidavit contains the following averment: "That the following statement in his application was not true, viz: 'I have no habit or injury or disease which will tend to shorten my life, and am now in good health.' Said statement was untrue, false and fraudulent in this that the said Edmund Francis Wall, at the time of making the same, was afflicted with and had phthisis with lung and bronchial trouble, and which caused his death of phthisis and pulmonary disease, November 16, 1893, and for which he had been previously treated, and did shorten his life." As none of this was stated or explained in the answers to questions put to the insured at the time of his application, and as he did then declare that he was in good health, it is at once manifest that the first part of the fifth point covers the case exactly, and was entitled to an affirmative answer. The same is true of the second part of the point which asked an instruction for defendant if at the date of examination any of the parents, brothers, sisters, grandparents, uncles, aunts or cousins had ever been affected with consumption or with pulmonary or hereditary disease. The affidavit of defense on this subject contains the following: "The said Edmund Francis Wall did make false, fraudulent and untrue answers to the following question asked him by the medical examiner at his medical examination, made November 14, 1892, as follows, the said question being, 'Have any or either of your parents, brothers, sisters, grandparents, uncles, aunts or cousins been afflicted with consumption?' To which the answer of said Edmund Francis Wall was 'No,' which said answer was false, fraudulent and untrue, in this that his aunt, Johannah Hickey, died in 1890 with consumption and pulmonary trouble; also that his cousin Thomas Hickey, son of said Johannah Hickey, died in July, 1892, with tuberculosis, at the house of said Edmund Francis Wall; also that his cousin, a Miss Wall, a daughter of said Johannah Hickey, who was

also living at his home the time he made said answers, was in the last stages of consumption, and who died within several months thereafter; also that his brother William, having been examined in the summer of 1892, and prior to his application by a physician, was found to have tuberculosis, was advised to go to another climate on account of his disease, and did go to either Colorado or California." A similar averment as to his brother James is in the affidavit of defense. The learned court below was therefore clearly in error in refusing the fifth point on the ground that the point went "entirely beyond any defense set up in the affidavit of defense." In consequence of this ruling the defendant was altogether deprived of a perfectly legitimate defense as to which there was abundant testimony. It was proved without contradiction that the applicant had bronchial catarrh from February to November, 1892, and was treated for it a number of times, and there was ample testimony from which a strong presumption arose that he also had pulmonary disease at the very time his application was made. The third assignment is sustained.

The fourth assignment is in the same situation as the third. The sixth point of the defendant asked for a binding instruction in its favor if the jury found that the applicant had been attended by Dr. Wiggins at certain dates named, all within a year before the application was made. The learned court answered by saying that the point was affirmed if the applicant had been attended for phthisis or lung, bronchial or pulmonary disease within the time named, on the ground that the affidavit of defense to allegations that he had been attended by physicians for trouble of this nature. An examination of the affidavit shows that this was a mistake. The affidavit alleges generally and without limitation that the applicant made false answers to questions contained in the application and in answer to certain questions to the medical examiner. It does not specify the particular questions, but the allegations of the affidavit would be supported if the answers to any of the questions thus propounded were false. If therefore the point should be sustained as to lung or bronchial disease, it should also be sustained if the answers were false as to any attendance by a physician. The application contained an express covenant of warranty of the truth of all answers to all questions of the medical examiner and the financial secretary, and an express stipulation that if any of them were false all benefits under the benefit certificate or policy were forfeited. In the questions of the financial secretary was the one, "When last attended by

a physician and for what cause?" And the answer was, "One year ago." The next question was, "Name and address of physician?" And the answer was, "Dr. Wiggins, McKeesport, Pa." Nothing was said in the question about any disease, but it did require a statement in response as to what cause the applicant was attended for. Now if he was attended by a physician for any cause within the year previous to the application, the answer was false and would preclude recovery. It was also concealment to omit the cause, and additional falsehood to state that it was the particular physician named, Dr. Wiggins, who had not attended him within the year. Now in point of fact Dr. Wiggins testified that he had attended the applicant on February 3, May 3 and 12, and June 7, and October 1, 15 and 22, all in the year 1892. The application was dated October 15, 1892, and no less than six of those attendances were within the limited period, one of them being on the very day the application was signed. The disease for which all the attendance had been given was bronchial catarrh, which was of so serious a character that by the following April it had extended into the lungs, causing severe cough and spitting of blood, and resulted in death from consumption the following November. The testimony of Dr. Wiggins was entirely uncontradicted, and it established beyond all question the falsehood of the answer in question. The effect of such an answer to such a question is fully established in the case of *U. B. Mut. Soc. v. O'Hara*, 120 Pa. 257. Mr. Justice PAXSON, delivering the opinion, and speaking of the inquiry, "Have you had any medical attendance within the last year prior to this date? If so, for what disease?" said, "The object of this interrogatory is manifest. If the assured had no medical attendance within the time prescribed, and so answers, that is an end of it. But if he had such attendance, then the company is entitled to know for what cause, and the name and address of the doctor, in order that they ascertain the particulars from him. And if the assured falsely answer that he had no medical attendance, he is not entitled to recover." To the same effect is *O'Hara v. Mut. Aid Soc.*, 134 Pa. 419. In *Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. 47, we said, "No principle of law will enable a party who guarantees a fact upon which a contract for insurance is based, which fact is afterwards found not to exist, to enforce the contract. He agrees to answer for the truth of the fact, and cannot escape on the ground of its mistake as to its existence." In *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571, it was said in the syllabus, "The insured represented that he had never been sick and had never been

attended by a physician. It was proved by his mother, the beneficiary, that he was ailing and had been attended by a physician within a month before the policy was issued. Held, a breach of the warranty which rendered the policy void." To the same effect is *Sullivan v. The Met. Life Ins. Co.*, 36 N. Y. 38.

The general doctrine that in actions on policies of insurance with a warranty of the truth of the facts, the validity of the contract depends on the truth of the warranty, and that the engagement of the policy holder is absolute that the facts shall be as they are stated when his rights under the policy attach, is so very familiar, and has been so frequently declared, that a mere reference to a few of our modern decisions will suffice: *Mut. Aid Soc. v. White*, 100 Pa. 12; *Blooming Grove Mut. Fire Ins. Co. v. McAnerney*, 102 Id. 335; *Life Assoc. v. Gillespie*, 110 Id. 84.

It needs only to be stated in passing that the answer of the applicant to a previous interrogatory, that he had been treated three years before by Dr. Wiggins for fracture of the ribs from which he had recovered, was not of the least consequence in considering the other answers which have been discussed.

We think the seventh assignment is also sustained. We know of no reason why the proposed amendment should not have been allowed. It did not propose any change in the parties, nor any in the cause of action, nor in the form of action. It was merely an application to amend the pleadings to accord with the proof, a kind of an amendment which is as a rule always allowed. No injustice would be done thereby, on the contrary, the application was in the interest of justice. We do not regard the objection that it was not made until after the testimony was closed as of any force. The statutes of amendment expressly allow amendments to be made, "at any stage of the proceeding." The proofs had been offered and received without objection, and the record showed the testimony already in, and nothing was required but to formulate the pleadings so as to conform to the testimony. We do not regard the granting or refusing of this amendment as vital to the defense, but as it harmonizes the pleadings with the proofs it should have been allowed.

The paper marked exhibit No. 6 purported on its face to be the "official notice of death," of Edmund F. Wall, and certified that "it is not in any part filled in by, nor has any information therefor been derived, directly or indirectly, from any member of the society." It contains full statements as to the sickness, death and burial of Edmund F. Wall, the cause of the

death, the place, the time, the place of interment, the names of attending physicians, and agreement that physicians may give information of all knowledge obtained in their professional capacity, and that the premier and secretary of the defendant society may ask such further questions and require such further proofs of death as they may think necessary; it purports to be signed by the plaintiff by her mark attested by two witnesses, and it contains a formal acknowledgment before a magistrate, who certifies over his signature that Ellen J. Wall was known by him to be the person who signed the statement, and that she being duly sworn by him did duly depose to the truth of the answers, assertions and allegations contained in the statement.

This paper was testified to have been found among the official papers of the defendant as part of the proofs of the death of Edmund F. Wall; it was taken by Mr. W. R. Spooner, the premier of the defendant, to the plaintiff, produced before her and her husband and discussed by them as a proof of their son's death, which had been furnished to the defendant, and told them that he was not satisfied with the proofs, and explained the reasons why he was not satisfied, and asked for additional information as to the facts set forth in the paper, and detailed long conversations had with them upon that subject. This paper being offered in evidence was objected to on the ground that it was incompetent, that it was not established by proper evidence, and that it stated facts not necessarily within the knowledge of the person making the affidavit. It certainly was relevant, and it was not offered as original proof of the facts stated. It was offered as a proof of death furnished by the plaintiff, and was of course admissible if it really came from her, and it was admissible in any event as a declaration against interest if its authenticity was sufficiently established. It was rejected by the court because it was not affirmatively proved to have been furnished by the plaintiff. But as it was produced before her by the defendant, and its contents were a subject of discussion between the plaintiff and the defendant's officer, and was not challenged, or in any manner disputed or denied by the plaintiff, it was beyond all question admissible to the jury without specific proof of execution, or of it being sent to the defendant by the plaintiff. At the very best the court could not say as matter of law that the conversation between the plaintiff and the witness Spooner did not relate to this paper. If there was any dispute on that subject it would have to be referred to the jury for solution. The witness was asked, "Q. I

asked you what these papers are? A. These papers that are marked exhibits 5, 6 and 7 are the proofs of death furnished upon the death of Edmund F. Wall. Q. By whom furnished? A. No. 5 was furnished or obtained, in so far as the doctor's statement is concerned, by Mrs. Wall, and given to the assembly committee, the other portions of it I believe were completed by the assembly committee, as I understand the fact to be. No. 6 was furnished by the beneficiary herself, and No. 7 was forwarded to the supreme office by Dr. Wiggins, upon the inquiry made of him when the beneficiary's statement showed that he was one of the attending physicians in the last illness." Upon cross-examination the witness said, referring to exhibits Nos. 5, 6 and 7, "They were official papers upon the files of the supreme secretary's office that came to me in the regular course of business, and upon my inquiry subsequently of Mrs. Wall and others, I found they were the papers, and verified their genuineness from the parties here." Being asked whether she read the papers when he showed them to her, he answered, "She did not. I read to her the portions to which I referred in my testimony." He said further that, "They (the papers) were submitted to her and her husband, and he examined them. Q. You undertook to inform them as to the contents did you? A. I informed them as to these particular features in the statements of the two doctors which gave to me doubt, and upon which I told them that I would have to reject the claim unless those facts could be controverted. Q. What statements if any did you make to Mrs. Wall relative to these papers? A. I told her and her husband that those were the proofs of death furnished, and so far as the paper signed by her is concerned, it was recognized on the subsequent conversation made and the statement of the doctor from Denver, and there was no denial upon the part of either. They seem to recognize both of these papers. The other paper, that of Dr. Wiggins, they had not seen before, and I read to them if I remember right, that full paper because it is a short one." There was very much more testimony as to the matters contained in the several exhibits, the whole of which proceeded upon the assumption that the papers were what they purported to be, and not the least question as to their authenticity. It is perfectly manifest that the acts, conduct, declarations and answers of the plaintiff to the questions put to her in respect to these papers constitute a mass of convincing testimony that all these papers were received, discussed, considered and acted upon by both the plaintiff and witness as genuine in all respects, and they

were therefore all of them admissible in evidence as such. Being treated as such by both parties no specific proof of actual execution was required. The eighth, ninth and tenth assignments are therefore sustained. The eleventh assignment is sustained because the portion of the charge covered by this assignment limits all right to make defense to the presence of, or treatment for, lung or pulmonary disease, at the time of the application, or within one year prior to that time.

Judgment reversed and new venire awarded.

GAERTNER v. HEYL et al.

A lessee who, declining to accept a lease as executed by the lessor, alters the terms thereof before signing the same and returning it to the lessor, is not guilty of forgery.

The fact that a lessee alters a lease already executed by the lessor, and, after signing the same, delivers it to the lessor's agent with the intention of misleading him, and through him the lessor, does not furnish the lessor and his agent probable cause for charging the lessee with forgery.

The fact that the lessor was told by the agent that the latter was imposed on by the lessee, whereas the agent in fact saw him make the alteration, did not afford the lessor probable cause to prosecute the lessee for forgery. Questions not raised by the assignments of error will not be considered.

Appeal of Frederick Gaertner, plaintiff, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of trespass, wherein William A. Heyl and Thomas McCaffrey were defendants.

This was an action to recover damages for a malicious prosecution on a charge of forgery.

The facts of the case which appeared on the trial, before PORTER, J., are set forth in the opinion of the Supreme Court, *infra*.

The defendant submitted a point as follows:

"It is immaterial whether the alteration was made before the plaintiff signed the lease, the same having been executed by the defendant Heyl." This was affirmed. (First assignment of error.)

He also submitted another point: "If the jury believe from the evidence that the plaintiff made the alterations in the lease, admitted to have been made without the knowledge or consent of the defendant, McCaffrey, without informing him of his action, there was probable cause for the defendants bringing the information."

This the court answered by saying: "If you find from the evidence that the plaintiff received the lease after it had been signed by Heyl and made the alterations in the part changed and signed the lease, concealing from McCaffrey

that he had made the change, and then returned the lease to McCaffrey, concealing from him the fact that there had been any change on the lease, that would be probable cause for the prosecution." (Second assignment of error.)

"Although you should find from the evidence that McCaffrey saw Gaertner make the change and knew it was made; if he went to Heyl and told him that Gaertner had done it surreptitiously and put the lease upon him such a way as to show an intent to take advantage of the alteration thus secretly made, then Heyl would be judged as acting upon what McCaffrey told him, and in such a case, although McCaffrey might not have probable cause to make such a charge, he misrepresented that to Heyl, and Heyl was deceived thereby, then Heyl would have probable cause. . . . But if the doctor altered these leases after Mr. Heyl had written his name there, and then having altered them, signed them when McCaffrey, the agent, came there, and passed over this lease without saying anything about it, with the intention of misleading McCaffrey as to the condition of that paper and so misleading Heyl, that would afford probable cause for the making of the charge which was here made, and in case you so find, you would simply say that you find for the defendants and say no more." (Third and fourth assignments of error.)

Verdict and judgment for defendants. The plaintiff took this appeal and filed assignments of error as above indicated.

For appellant, *Thomas M. Marshall* and *A. G. Smith*.

Contra, J. E. O'Donnell and *Joseph Breil*.

Opinion by WILLIAMS, J. Filed January 4, 1897.

William A. Heyl was the landlord of the plaintiff, and McCaffrey, the other defendant, was the agent and collector for Heyl. In the spring of 1893, and shortly before the close of the then current year, Heyl had a new form of lease prepared changing the terms, and somewhat increasing the burdens of the tenancy of Gaertner. This was brought to the plaintiff's office by McCaffrey, who requested him to sign it. This the plaintiff refused to do. Other interviews were had between them in which the agent insisted that the new lease must be signed, and the plaintiff as stoutly insisted that he would not sign it. At length McCaffrey left with the plaintiff a copy of the new lease, signed by Heyl, and gave notice that he should call for it within a day or two, and that it must be signed. When he next called the plaintiff says he took down the lease from a pigeon hole, changed its

terms to make them conform to those of the old lease, signed it, and handed it to McCaffrey, who took it and went out. When Heyl received it, he refused to accept it, and within two or three days had a prosecution instituted before a justice of the peace against Gaertner for forgery. The affidavit on which the warrant issued, was made by McCaffrey.

When the case reached the grand jury, the indictment was returned not a true bill, and the costs were imposed by them on the prosecutor.

Some time afterwards this action was brought against the defendants for malicious prosecution. Upon a showing of the facts now stated, it became the duty of the defendants to show that they had probable cause for the prosecution for forgery. For this purpose they relied on the fact that an alteration was made in the lease while it was in Gaertner's hands, and on the advice of an attorney that the alteration of the paper was a forgery. As there was no denial that the alteration was made before the signing by Gaertner, and the delivery of the paper to McCaffrey, it was contended that the alteration was not a crime of any sort, but the exercise of a clear legal right; that the paper did not become a contract until he had signed it, and that whether he would sign it as it was presented to him, or insist upon such change in its terms as would give it the same effect as the lease then existing was for him to determine.

Upon this question the defendants' counsel asked the learned trial judge to instruct the jury that "It is immaterial whether the alteration was made before the plaintiff signed the lease, the same having been executed by Heyl." This point was affirmed. Whatever the learned judge may have intended by this answer, it was calculated to lead the jury to believe that in the judgment of the court the alteration in the terms of the lease by the tenant at any time after it had been signed by Heyl was a forgery.

Forgery is the fraudulent making or alteration of a writing to the prejudice of the right of another. The proffered lease was not a contract till signed by the tenant and delivered to the landlord or his agent. The landlord had no rights under it against anybody. It was of no more value to him than so much blank paper until the tenant had assented to its provisions by executing it. It was a proposition to let the rooms to Gaertner on the condition named in the paper. This proposition he distinctly declined and modified it in accordance with his own ideas of what it should be. As so modified he signed it and sent it to Heyl. This did not bind Heyl until he accepted it. It was a propo-

sition by Gaertner to rent the rooms on the terms stated in the modified lease which Heyl was at liberty to refuse, and as it seems did refuse. The change made by Gaertner in the terms of the lease was not a forgery. It did not affect the rights of the landlord in the slightest degree, and the jury should have been distinctly instructed to that effect.

The fourth assignment of error must also be sustained. In the portion of the charge embodied in this assignment, the learned judge instructed the jury that the change in the form of the lease, if made after Heyl had signed it and with a view to mislead McCaffrey, would afford probable cause for charging Gaertner with the crime of forgery. This was clearly error. It might show a dishonest purpose, but it did not show a forgery, or disclose any reason for charging such a crime upon the tenant. On the contrary the letter of the justice by whom the warrant was issued, written on the morning before the warrant was issued, looks very much as though the prosecution had been resorted to to compel compliance by the tenant with the wishes of the landlord, and secure the execution of the new lease in the form in which it had been originally presented to him. If the jury should so believe, this would afford proof of malice and justify a verdict in favor of the plaintiff. No question as to the effect of the advice of counsel is raised by the assignments of error, and we are not called upon to consider that branch of the defense made in this case. Ordinarily, the first step in an attempt to show probable cause for charging a crime upon a particular person, is to show the commission of the particular crime by some person; and then give the circumstances which seemed to connect the person proceeded against with the crime so committed. Thus, if A. should prosecute B. for robbery, and failing to establish his guilt should be sued for malicious prosecution, he would show the fact of the robbery and the reason that led him to believe that B. was the robber. But if he failed to prove that he had been robbed, it is not easy to see how he could show probable cause for the prosecution of B. for a crime that had not been committed. But in this case it may be that an honest belief that a forgery had been committed, if reached after such examination and inquiry as a reasonably prudent man should make before assailing the character of his neighbor, would stand in the place of the crime itself for the purposes of this case. Whether this be so or not is a question not raised on this record. The third assignment is also sustained. No man has a right to launch a criminal prosecution against another upon the circumstances

stated in the instruction complained of in this assignment. McCaffrey's statements to Heyl that Gaertner had imposed upon him in the matter of the lease, is not probable cause for charging the crime of forgery upon Gaertner. It is a circumstance that, connected with others, would be competent to put in evidence, but standing alone, it is not enough. It did not furnish probable cause.

The judgment is reversed and a venire de novo awarded.

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

DZIK v. BIGELOW et al.

A shanty boat or Jo-boat, located on the bank of a navigable river, below high water mark, and used as a place of residence, is a public nuisance, which it is the duty of the municipal authorities to abate.

A party owning or occupying such a boat, located below low water mark, having refused, after notice, to remove the same, the municipal authorities had a right to demolish and remove it.

No. 696 Jan'y T., 1896.

ORAL CHARGE OF THE COURT.

EWING, P. J., April 6, 1897.

Gentlemen of the Jury:—The plaintiff, Jacob Dzik, has brought suit against E. M. Bigelow, S. T. Paisley, G. W. Moore and the City of Pittsburgh to recover damages, as he alleges, "for entering upon and taking possession of a house, or boat, which was in the river, in Pittsburgh, on the south side of the Monongahela river, and ruining and destroying it," and he also charges that they destroyed his household furniture and utensils, and put out his family.

There are some facts in dispute in this case, but the essential facts are not in dispute. It seems that for several years prior to the first of January, 1895, there had been a series of what were called "Jo-boats," or "Shanty boats," on the river bank, running from Sixth street on the South Side, as far up as Tenth or Twelfth street. When it was high water the boats would be in the water, and when the water was low they would be up on the bank, or out of the water. They were in there so closely that the witnesses say between Sixth and Eighth streets there were some fifteen or twenty boats; and they were so closely joined together that it destroyed access to the bank of the river, except by some narrow passage way that a man might go through, and in places the boats were end to end; and families were living in them, and they had boarders living with them.

It seems from the testimony that the plaintiff's boat lay some place between Sixth and Eighth streets. I understood the plaintiff himself to say that it was immediately above Sixth street; another witness said it was the second or third boat from Sixth street; and another witness put it in the block between Seventh and Eighth streets, and he said that he had a boat next to him; it was somewhere between Sixth and Eighth streets. According to the testimony, it had been placed there so far back that nobody who was examined knew how old it was, but it had been there some seven or eight years. It had apparently been floated up in high water, and then propped up on piles, and afterwards the bank had been filled in behind with cinders, and cinders were also put in beneath it, and the plaintiff said some were put in below it. It stood up several feet above the river level; the hull of the boat, or the boat proper, being on top of these piles. Then the piles were boarded on the sides, and probably on the ends, and then there was some sort of superstructure on top of the hull, in which the family lived.

The Monongahela river is a navigable stream. It is a highway, and it is to be used for purposes of navigation, and matters necessarily connected therewith. Aside from that the owners of the river bank, or of the adjoining property, have a right to land on it. It seems that between Fourth and Sixth streets is a public wharf, and at the ends of the other streets which come down to the river it is also a public wharf at other points.

About 1858 there was an Act of General Assembly passed providing for a commission to be appointed by the old District Court, in part to remedy the troubles which had arisen from time to time, occasioned by people not knowing where high and low water mark was. The commission was authorized to survey the Ohio, Monongahela and Allegheny rivers, from a point below Pittsburgh to points above, and to report the high and low water lines of those rivers. That was done. A report was made, and in accordance with the Act of Assembly proceedings were taken in court; the riparian owners and others were entitled to file objections, and the report was finally confirmed and it became a record. Usually the distance between high and low water mark is 80 feet. That being a public record and public act, we are bound to take judicial notice of it, and especially as it is a record of this court, and we have done so in different cases.

The riparian owners have a right to build out to high water mark; below high water mark to

low water mark, the riparian owners have a qualified right. They have no right, however, to build permanent structures between high and low water mark, simply in the way of residences or anything not in use in connection with the navigation of the river. That would be an obstruction. The plaintiff in this case, and his co-residents in the shanty boats that lined the shore, had no right there. They had no authority, or license, or permission from the riparian owners, and I am unable to see any right that they had, except that of trespassers on the highway. The uncontradicted testimony of the surveyors is, that this line of shanty boats that were anchored there, fastened to the piles, were out in the river, and were even below the low water mark. As such, they were *per se* nuisances. They had no more right there than they would have to build the same sort of a thing in this street alongside of the court-house; and the city had no right to license them to locate or remain there, for the purposes for which they were used. They shut out the riparian owners from access to the river there, and they were trespassers as to them, and that would have been abated in proper proceedings, as we have done in a number of cases, even where they were endeavoring to load and unload coal, to exclusion of the riparian owners, and where they anchored in front of property, shutting out the owners.

Now while, according to the testimony, the city, by one of its officers, had been collecting a sort of rent or license fee from each owner of a shanty boat, of a dollar a month, that really did not give them any right there. The city had no right to do that. They had no right to license them to put these obstructions in this place. It was a wrong to the public and a great wrong to the owners of private property alongside.

This plaintiff was notified by the city authorities to leave there. He says himself he was notified about the first of January. The man who served the notice says it was in December, just before the first of January, that he was notified to remove this boat. He did not do it, and none of them did it. They were again notified. As to the time, the testimony varies a little. But they were notified again the last of May or first of June, that they must absolutely get out before the first of August. They did not go, and they were notified again, verbally, according to the uncontradicted testimony, that they must get out, and they did not do it. Well, now, that being the case, it was not only the right of the city authorities, but it was also their duty to remove the nuisance. They had a right

to tear them down and to remove them, and for the simple tearing down and demolishing of these shanties on the highway, the plaintiff has no right of action. He might have been indicted and convicted of maintaining a nuisance, and punished by fine and imprisonment, and he might have been removed summarily.

We might have stopped the testimony with this, but there was testimony offered to show that it was particularly a nuisance and menace to the health and peace and safety of the community, and we admitted it, and we admitted testimony on the other side, and we did it in part for a purpose. There is a public reason for it. You have had the testimony of the respectable people in that neighborhood, the owners of the property adjoining. They tell you how everything that was left out was picked up; how they were afraid to leave anything lying around, and that thefts were of frequent occurrence. The officers of the railroad passing there say the same thing, that the people from these shanty boats were habitually stealing things from their trains, and that it has almost entirely ceased since the boats were removed. You have the testimony of these same people in regard to the constant quarrels and the serious disturbances of the peace there; and the testimony of the police officers as to the dangerous character of it. And even the testimony of some of the plaintiff's own witnesses; the clergyman, for instance, who says that they were all fine people; he tells about the people he saw there, and they were not those you would usually find in decent quarters. So you need not go outside of the testimony of the plaintiff, I think, to find that it was a bad place.

I desired the record to show something of what the character of these places are. For twenty years or more I have had, and those who sit in the criminal court, every term have had lessons in regard to the character of the people who frequent these Jo-boats. Decent people may live there, and probably do; and honest people may and probably do live there occasionally, but it is not the rule. Not only from the testimony in this case, but in very many cases tried in the criminal court, I have had occasion to ascertain what these places are. Receptacles for stolen goods; residences of thieves, and scenes of violations of the law in almost all lines in which we have criminal offenses tried. The "river thief" and "wharf rat" is a proverbial expression. Why it is so I would not undertake to say. I would not undertake to give the philosophy of it. There may be something in the vagrancy of this sort of

people; in their getting a residence where they have no right to, and where they are responsible to nobody; but taking the testimony in this case, the experience of a long time in the criminal court, observations in different places in this country, and in Europe, and as I read history, it is traditional, it is the rule that the population residing in such places are a criminal and dangerous population. I do not in this include people connected with navigation or river trade. I have called attention to it over and over again in the criminal court, and have expressed surprise at the authorities of this city in permitting so much of it, and I do it again. The testimony indicates that they have been permitting some to still remain. I think that public interest, public peace and public safety require that it should be prevented, and especially as it is a menace to health and peace. It is not possible that people who reside in such places, and so many of them as there were over in this place, could help but be a menace to public health, even if the best of people resided in the boats.

Now, these not having been removed on the first of August, the city authorities proceeded to remove them. In regard to the personal property on the boat or shanty, or whatever you call it, the plaintiff admits that it was taken out onto the bank, that it was not destroyed, and it was not carried off by any of the defendants; and if any of it was injured (while he says some of it was, he does not undertake to say how, or to what extent), but if any of it was done, it was done by some persons on the bank, not connected with these defendants, so he cannot recover for that.

Now, notwithstanding all this, they could not recklessly and wantonly injure property; but as I said before, it was just as though somebody had built this obstruction in the public street, and they had a right to demolish it after the party had refused to carry it off; and while there might have been some boards left that were not left, taking the whole evidence as to the manner in which it was done, I instruct you that the defendants had a right to remove it entirely from the premises, to demolish and remove it, and it is a pity that some of these others that the parties took down themselves, and anchored somewhere out in the stream below, had not been demolished also, so that they could not be made into a nuisance in another place. Your verdict should be for the defendants.

For plaintiff, *J. T. Buchanan* and *W. J. Jordan*.

For defendants, *J. H. Beal* and *A. J. Niles*.

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PITTSBURGH, PA., MAY 5, 1897.

Supreme Court, Penn'a.

TEUFEL v. ROWAN.

ROWAN v. ROWAN.

The stipulations in a lease provide that the failure to pay rent within five days after it becomes due shall render the rent for the whole year due and payable is not waived by the acceptance of rent overdue and unpaid, and does not prevent the landlord from claiming rent for the year in a distribution arising from a judicial sale of the tenant's personal property.

Appeal of F. M. Teufel and Leontine Rowan from a decree of the Court of Common Pleas No. 3, of Allegheny county, sustaining exceptions to auditor's report and making distribution of fund raised by sheriff's sale of personal property.

The facts as found by the auditor, J. M. Stoner, Esq., are recited in the opinion of the Supreme Court, *infra*.

The auditor was of opinion that the acceptance by the landlord of the rent after it became overdue operated as a waiver of his right to insist that under the lease a failure to pay when due caused the full balance of rent to become due and accordingly held that the landlord was entitled to rent only up to the time of the sale.

Exceptions to this ruling were sustained by the court, KENNEDY, P. J., and it was directed that the landlord be paid the full amount of his claim for rent. Plaintiffs in the execution appealed from this order, assigning for error this action of the court.

For appellant, *C. S. Crawford*.

Contra, *W. G. Guiler, M. A. Woodward and Lyon, McKee & Sanderson*.

TEUFEL v. ROWAN.

Opinion by STERRETT, C. J. Filed January 4, 1897.

The learned auditor, charged with the distribution of the fund raised by the sheriff's sale of the defendant's personal property, reported in substance the following findings of fact, *inter alia*:

That the defendant, John Rowan, leased from Jacob Kaufman *et al.* the Central Hotel for five years from April 1, 1892, at a rental varying

in amount each year. The rent for the third year, commencing April 1, 1895, was \$13,000, payable in advance on the first of each month. By a subsequent and "auxiliary agreement," all the rent reserved in the lease became immediately due and payable upon default or failure, for five days on the part of the tenant, to pay any of the monthly installments of rent, or any part thereof.

The property levied on and sold was upon the demised premises, at time of seizure, and liable to be distrained for all the rent then due.

At the time of the levy the tenant had already failed to make one or more of the monthly payments of rent for the year commencing April 1, 1895.

Prior to the levy the landlords had accepted from their tenant payments of rent overdue and in arrears under the terms of the lease.

The legal conclusion drawn by the auditor from his findings of fact were, *inter alia*, substantially as follows:

That the acceptance of overdue rent by the landlords condoned the default arising under paragraph contained in the "auxiliary agreement," from their tenant's failure to pay his rent according to agreement, "and operated as a waiver of said paragraph; and that said waiver is attended with the same legal consequences with respect to any other or future default by said tenant under said paragraph, as if covenant therein expressed had never been made." He accordingly held that the landlords were entitled to rent only up to the date of the sheriff's sale, August 30, 1895.

Exceptions to these conclusions were filed by the landlords; and in the decree from which this appeal is taken the learned court below sustained the exceptions, and awarded rent to the landlords for the year ending April 1, 1896. In thus holding that the tenant's default under the paragraph in what is termed by the auditor the "auxiliary agreement," which provides in substance that all rent reserved in the lease shall become immediately due and payable upon default or failure of the tenant, for five days, to pay any monthly installment of rent or any part thereof, was not condoned by the acceptance of overdue rent, the court was clearly right on both principle and authority. The clause in question is a part of the contract between the parties. As was well said by the learned president of the Common Pleas: "The acceptance of a portion of the amount due, and failure to exact all that was due at that time, cannot be a waiver of the contract, but at most is only evidence of a willingness to indulge the debtor."

Similar stipulations in mortgages have been

upheld in numerous cases from *Huling v. Drexell*, 7 Watts, 126, to *Platt, Barber & Co. v. Johnson et al.*, 168 Pa. 47. In *Atkinson v. Walton*, 162 Pa. 221, our Brother DEAN says: "The rulings in all the cases from *Hulings v. Drexell*, 7 Watts, 126, to the present have been that in this class of securities the issuing of a *scire facias* is not to declare and enforce a forfeiture, but to enforce the payment of a debt, which by the contract became due. . . . It has never been held that mere delay of suit, or neglect to rigorously exact his money on the day it is due, is evidence of a waiver of his (the creditor's) contract right." The principles underlying these cases rule the question under consideration in favor of the landlords.

The cases cited by the plaintiff on the subject of forfeitures, etc., have no application to the case before us.

Decree affirmed and appeal dismissed at appellant's costs.

ROWAN v. ROWAN.

Opinion by STERRETT, C. J. Filed January 4, 1897.

This case was argued with *F. M. Teufel*, to use, against the same defendant, No. 82 October Term, 1896, in which an opinion has just been filed. In both cases, the facts are substantially the same, and the questions of law are identical. For reasons given in the opinion referred to there is no error in the record.

Decree affirmed and appeal dismissed at appellant's costs.

BRAUNSCHWEIGER et al. v. WAITS.

In the trial of an issue as to whether a judgment note had been obtained by fraud, where the only evidence to justify to opening of the judgment on the part of the defendant is that he gave it as the purchase price of a farm, the oil wells upon which the plaintiff falsely represented to be of a certain value and to flow a certain amount of oil, it is error for the trial judge to charge that if the parties dealt under the influence of a mutual mistake the defendant could avail himself of such mistake, although the jury should conclude that no fraudulent misrepresentations had been made by the plaintiff.

Appeal of M. Braunschweiger and Joseph Manning, plaintiffs, from the judgment of the Court of Common Pleas of Venango county, in an action to determine the validity of a judgment.

The court charged in part as follows:

It appears from the evidence, however, and is not questioned by either party, that there were only fifteen wells shown to the defendant, and if you find that there were more than that number of wells drilled upon the property, and

that the plaintiffs failed to show those wells to the defendant because of the fact they did not know of them, then another question will arise; that is, whether there was mutual mistake here of such a material character as to make inequitable to enforce the terms of this contract against the defendant. If you find that those eight other wells were drilled upon the property, that that fact is material, and that the defendant would not have entered into this contract if he had known of those eight other wells being drilled, and known of the character of the wells, why then he may be entitled to relief. That is, if you find those facts, then you may properly conclude that the defendant had a right not to enter into the contract, not on the ground of fraudulent representations, but on the ground of mutual mistake as to a material fact.

For appellant, *W. J. Breene* and *Dunn & Carmichael*.

Contra, *J. H. Omer*, *John O. McCalmont* and *J. M. McGill*.

Opinion by WILLIAMS, J. Filed January 4, 1897.

A judgment was entered in the Court of Common Pleas of Venango county in favor of the plaintiffs and against the defendant by virtue of a warrant of attorney for \$20,608.81. This judgment was opened on the petition of the defendant representing that the execution of the paper had been induced by misrepresentations. An issue was framed for trial before a jury to determine how much if anything was due to the plaintiffs on the judgment. On the trial it appeared that the paper was executed and delivered under the following circumstances: Waits was an oil producer. The plaintiffs were the owners of a considerable farm known as the "Astral Oil Refining Company's farm," in Cranberry township, Venango county, upon which where two producing wells. They proposed to sell this farm to Waits. He went with them to see it, and, as he alleges, upon their assurance that the producing wells were yielding five barrels per day, that but fifteen wells had been drilled on the farm, none of which had been dry holes, and that a considerable portion of the land had not been drilled upon at all, he agreed to purchase it for \$20,000, and executed the preliminary contract on which the judgment was entered. The title was to be made at the end of ten days. It was not made and tendered for about two months. Meantime the defendant says he learned that the land had been well drilled, at least twenty-three oil wells having been put down upon it, all but two of which had been abandoned, and that these in-

stead of producing five barrels per day, were producing only about one-half of that amount, and at a wholly disproportionate cost, so that the tract was of little value, and would not have been bought by him if its condition had been truly stated to him. In other words his defense was fraud upon the part of the plaintiffs in making the contract of sale. This was the only defense set up by the affidavit on which the rule to open judgment was moved for, and it was the only one raised by the evidence on the trial. It was error therefore to submit to the jury the question of mutual mistake, as was done by the learned judge, in that portion of his charge that is made the subject of the eleventh assignment of error. He said in substance that if the parties dealt under the influence of a mutual mistake, the defendant could avail himself of such mistake, although the jury should conclude that no fraudulent representations had been made by the plaintiffs. If the defendant made the purchase upon his own examination or previous knowledge of the property, and no representations were made to him by the plaintiffs to induce the purchase, the defendant was without a defense. If he bought upon the representations of the plaintiffs, and these representations turned out to be false, then he had a defense. Whether they affirmed that to be true which they knew to be false, or which they knew nothing about, the effect was the same upon the purchaser. It was in either case a fraud. The question for the jury was whether the purchase was induced by representations materially affecting the value of the land, which were false. If they were false it was of no consequence whether the plaintiffs knew their falsity, or made them without any knowledge on the subject. It was their duty to know, and to make no representations as to the subjects of which they knew nothing. The case of a mutual mistake is well illustrated by *Riegel v. The Insurance Company*, 153 Pa. 134. Mrs. Riegel held a policy upon the life of a debtor who had been long unheard of and was in fact dead. This fact was not known to her or to the insurance company. Upon the mistaken assumption that he was still alive, and that she was still liable for premiums upon the policy, she made a contract with the insurance company. This contract was made in mutual mistake about a fact of which neither party had or pretended to have, any knowledge whatever. What is alleged here is that the defendant agreed to make this purchase because of representations about facts material to the value of the property, made by the vendors which were false. This if true was a fraud. The instruction

complained of opened a way for the jury to find for the defendant without disposing of the question of fraud which was the only question on which the right of the defendant to relief rested. Whether the jury took this way or not it is impossible to tell. It is enough that they might have done so. The instructions complained of in the first and fifth assignments of error may not have misled the jury and probably did not, yet they were wanting in accuracy. The weight of evidence is not a question of mathematics, but depends on its effect in inducing belief. It often happens that one witness standing uncorroborated may tell a story so natural and reasonable in its character, and in a manner so sincere and honest, as to command belief, although several witnesses of equal apparent respectability may contradict him. The manner and appearance of the witness, the character of his story and its inherent probability may be such as to lead a jury to believe his testimony, and accept it as the truth of the transaction to which it relates. The question for the jury is not on which side are the witnesses most numerous, but what testimony do you believe? In most respects this case was well tried by the learned judge. The only serious error into which he fell is that pointed out by the eleventh assignment of error, and for that it becomes necessary to reverse the judgment and send the case to another jury to be disposed of upon the question of fraud raised by the defendant's affidavit.

The judgment is reversed and a venire facias de novo awarded.

MACK v. WRIGHT et al.

The Act of May 11, 1893, requiring persons having charge of the erection of a building to provide scaffolding for the protection of the workmen above the third floor, the failure of the person having charge of a building in the course of construction to comply with the terms of the act does not make him liable for the death of a workman killed by falling from the fifth story, in the absence of evidence of negligence on the part of the defendant, as the act provides only a penalty for a failure to comply with its terms and not a right of action accruing to the plaintiff.

Appeal of Clarissa B. Mack, plaintiff, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in entering a nonsuit in an action brought by her to recover damages for the death of her husband.

This case arose by an action brought by the appellant against Richard S. Wright, H. R. Rose and R. W. Fisher, doing business as Rose & Fisher, and the Chautauqua Lake Ice Company, to recover damages for the killing of her

husband, on the five-story building in process of construction at the corner of Thirteenth and Pike streets, in the city of Pittsburgh.

The Chautauqua Lake Ice Company, on the 13th day of February, 1894, made a contract with Rose & Fisher for constructing a four and six-story storage and stable building at the place mentioned.

Under the act, approved May 11, 1883, the duty was enjoined on the party, or parties, having charge of the construction of any new building hereafter erected in this Commonwealth, to have the joists, or girders, of each floor above the third story covered with rough scaffold boards, or other suitable material, as the building progresses, so as to sufficiently protect the workmen either from falling through such joists, or girders, or to protect the workmen and others who may be under, or below, each floor from falling bricks, tools, mortar or other substances, whereby accidents happen and injuries occur, and the lives and limbs are in danger.

In this case the building had been constructed, and John Mack, the deceased, was sent by Richard S. Wright, who had charge of the construction of the carpenter work, to the roof of said building—the roof being on the fifth story of said building,—engaged in this work, sitting on the roof. He fell to the bottom of the building, and was instantly killed.

As the building progressed, the floors from the bottom to the top were not covered with rough scaffold boards, or any other material, sufficient to prevent persons from falling through, or to prevent material from falling to the lower floor; and at the time of this accident there were no boards or any material, placed on said floors whereby the deceased could have been saved from death.

After the plaintiff's case was closed, the counsel for the Chautauqua Lake Ice Company made a motion for a compulsory nonsuit, which was granted.

The complaint in this appeal is, that it was a fair question for a jury as to whether or not Richard S. Wright and Rose & Fisher were liable for this accident to John Mack, the husband of the plaintiff.

The court entered a judgment of compulsory nonsuit as to Richard S. Wright and Rose & Fisher.

For appellant, *James Fitzsimmons*.

Contra, Stone & Potter.

Opinion by McCOLLUM, J. Filed March 29, 1897.

The plaintiff rests her case upon the Act of May 11, 1883, which declares that "it shall be

the duty of the party or parties having charge of the construction of any new building hereafter erected in this Commonwealth to have the joists or girders of each floor above the third story covered with rough scaffold boards or other suitable material, as the building progresses, so as to sufficiently protect the workmen either from falling through such joists or girders, or to protect the workmen or others who may be under or below such floor from falling bricks, tools, mortar or other substance whereby accidents happen, injuries occur and life and limb are endangered." In the second section of the act it is provided that for any violation of it "a penalty not exceeding one hundred dollars for each floor of joists or girders left uncovered shall be imposed to be collected as fines and penalties are usually collected." It does not expressly give a right of action for an injury attributable to the non-performance of the duty prescribed, nor declare that the failure to comply with its provisions shall be taken to be negligence *per se*. In this respect it differs materially from the statutes which prescribe regulations for the protection of the workmen in the coal mines of the Commonwealth. These statutes create new duties, and impose penalties for the non-performance of them. In addition to the penalties imposed for non-performance, they expressly give to the party injured by it a right of action against the party at fault for the direct damage caused thereby, and, in case of his death by reason of such non-performance, they give to his widow and lineal heirs a right of action "for like recovery of damages for the injury they have sustained." See Act March 8, 1870, P. L. 12; Act June 30, 1885, P. L. 295, 218. The Act of June 1, 1883, P. L. 55, requires the owner, agent, lessee, or foreman of any anthracite mine or colliery in this Commonwealth to furnish to the miner, at his request, all props and timbers necessary for the safe mining of coal and for the protection of the lives of the miners, and provides that the failure to do so "shall be taken to be negligence *per se* upon the part of the owner, agent, lessee or foreman of said coal mine in any action for the recovery of damages for accidents resulting from the insufficient propping or timbering of said mine." The statutes which require that fire escapes shall be provided for and affixed to certain buildings designate the parties charged with the duty of providing and affixing them, impose penalties upon such parties for the non-performance of the duty enjoined, and in addition thereto a liability for damages in case of death or personal injury sustained in consequence of fire breaking out in any such building in the

absence of such fire escape or escapes: Act June 11, 1879, P. L. 128; Act June 1, 1883, P. L. 50; Act June 3, 1885, P. L. 65. These statutes are referred to as showing that when the Legislature has imposed a new duty and intended that there should be cumulative remedies for the breach of it, it has usually, if not uniformly, said so in plain terms. The inference is that if the Legislature had intended that, in addition to the penalty imposed by the statute under consideration for the non-performance of the duty prescribed by it, a party injured by such non-performance should have an action for the damages sustained thereby, it would have said so. The presumption is that, where a statute imposes a duty where none existed before, the remedy provided therein for the breach of the duty is exclusive. No case has been cited to us, nor are we aware of any, in which this court has held that for the breach of such a duty there was a remedy other than that prescribed by the statute. The existence of the duty imposed by the statute on which the plaintiff relies for a recovery in this action dates from the 11th of May, 1893. Prior to that time the parties having charge of the construction of new buildings in this Commonwealth were not required to do what was then enjoined by the statute. It is practically conceded by the learned counsel for the appellant that but for the Act of 1893 the nonsuit was properly entered. There is nothing in the evidence to charge the defendants with negligence aside from their failure to comply with the statute in regard to covering the joists or girders, and this is not shown to have been the proximate cause of the accident. But we need not now discuss this branch or feature of the case. As we think the remedy provided by the statute for a violation of the duty imposed by it is exclusive, and that the penalty prescribed for such violation is not recoverable in this action, we must sustain the judgment entered by the court below.

- The specifications of error are overruled, and the judgment is affirmed.

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

CHAMBERS v. McKEE et al.

In cases of fraud or mistake courts of equity will interfere to set aside awards upon the same principles and for the same reasons which justify their interference in other matters where there is no adequate remedy at law and where there is something more than a mere error of judgment, such as a mistake arising from a misunderstanding of actual facts which lead arbitrators to a wrong conclusion, equity will relieve.

Where in a dispute between two companies, in which both agree to settle by arbitration if a mistake is made by one of the arbitrators of a nature which would be sufficient to set aside the award in equity, a bill in equity to set aside the award will not be granted at the suit of a stockholder if it appear that notwithstanding the mistake the directors of the company, without fraud, agreed to abide by the decision of the arbitrators and settled accordingly.

No. 90 Sept. T., 1896. In Equity.

Opinion by STOWE, P. J. Filed November 10, 1896.

The bill filed in this case, after praying for a preliminary injunction to restrain defendants from using gas produced at the wells of the Chambers-McKee Glass Company, or transported through its lines at and in the vicinity of its works in Jeannette, Westmoreland county, which the evidence will not justify, prays, *second*, that a certain award of W. D. Hartup and George H. Brown, made December 21, 1891, finding the sum of \$28,000 to be due from the firm of McKee & Bros. to said company, particularly set out in section 5 of plaintiff's bill, be declared null and void, for the reason, as therein stated, that George H. Brown, one of said arbitrators, had made a mistake in computing the amount to be paid by said firm of McKee & Bros. to the Chambers-McKee Glass Company; notice of which mistake was given by said George H. Brown to Robert Pitcairn, one of the directors of said company, on the 29th December, 1891, and notwithstanding which notice, known to the board of directors of said company to have been given, the said board, disregarding the interest of said company, resolved and determined to settle on the basis of said award, and that said Brown had been deceived by misrepresentation made to him as to the furnaces of said company and the gas consumed therein; and, *third*, that an account be taken of the gas heretofore used by McKee & Bros., belonging to the Chambers-McKee Glass Company, upon the basis of the cost of producing and transporting the same, in proportion to the amount of gas used to January 1, 1892, and since that date, at the market price, and that said McKee & Bros. be decreed to pay whatever sum may be justly due, etc.

The first question now presented is whether there is sufficient evidence of mistake or fraud on the part of said referee or others interested to make it the duty of the court to set aside the award made by the said arbitrators.

In cases of fraud or mistake courts of equity will interfere to set aside awards upon the same principles and for the same reasons which justify their interference in regard to other matters where there is no adequate remedy at law, but

a party to an award cannot have it set aside upon the simple ground of erroneous judgment in the arbitrator, for to his judgment the dispute is referred. In order to induce the court to interfere there must be something more, such as corruption or gross mistake, either apparent upon the face of the award, or made out by the evidence.

Where, however, there is a mistake of material facts and the arbitrators are themselves satisfied of the mistake, although not apparent on the face of the award, and if in their view it is material to the award, then, although made by extrinsic evidence, courts of equity will grant relief: *Story's Eq. Jur.*, § 1456. But courts lend a very reluctant ear to complaints against awards, and without there is fraud, misbehavior, imposition or palpable mistake, which must not be one of mere judgment or law, but such as arises out of a misconception of facts upon which such erroneous conclusion is based, equity will not undertake to strike down an award: *Underhill v. Van Courtland*, 2 Johns. Ch. 363-4.

It seems to be clearly settled that in case of gross mistake, even where there is neither fraud or misconduct, an award may sometimes be set aside, and now the question arises, has such a mistake been shown by the evidence in this case?

The evidence upon this point is sufficiently clear and satisfactory that George H. Brown, one of the arbitrators in making his award, took the aggregate areas of the pipes on both sides of the furnaces and figured upon the assumption that the pipes on both sides of the furnaces were in use and consuming gas at the same time, while in fact they were not so used, and that he was not aware that the furnaces at defendants' glass works consumed gas only on one side at one time, and that this fact, if known to him, would have made a difference in his award, and would naturally have had the effect of increasing the proportion of the Chambers-McKee Glass Company's percentage, and the evidence also shows that this difference would be very considerable, amounting to some 30 per cent. of the entire fuel consumed. That is to say, that the difference between these furnaces as used, consuming gas only on one side at a time, and the use of gas on both sides at the same time, would be some 30 per cent. of the fuel thus consumed; and, therefore, the basis upon which Mr. Brown computed the consumption of gas, to wit, both sides of the furnaces at the same time, resulted in charging the Chambers-McKee Glass Company some 30 per cent. more than should in fact have been charged

against it. There is not the least evidence of imposition or misconduct on the part of the arbitrators or any other person interested in the award.

Hartupée understood all about the nature and use of the furnaces, and says he took that into consideration and found his opinion accordingly, but it is clear that Mr. Brown was under a misapprehension as to the manner of the use of the gas in these furnaces, and based his opinion upon a mistake of fact in relation thereto, which caused him to come to a different conclusion from what he otherwise would have done.

This, it appears to me, is not a mere error of judgment from which equity will not relieve, but something more; it is a mistake arising from a misunderstanding of actual facts which led him to a wrong conclusion; not a mere error of judgment based upon established facts, but an error in reference to the facts themselves upon his judgment was based, and which he hastened to correct as soon as he became aware of his mistake by notifying the defendant company to that effect.

If the case rested here I would be of opinion that the award should be set aside, but unfortunately for plaintiff she was a stockholder of defendant company. The board of directors had full authority to make a contract of settlement of the dispute between the company and McKee & Bros. in relation to the amount of gas used and the basis of calculation and payment therefor.

This could have been done without a reference to arbitrators, and it appears beyond dispute that after this alleged mistake was brought to the notice of the directors of the company they discussed the question, appointed a committee to examine into the matter, and after a time resolved to abide by the award as conclusive and a final settlement of the matter, and so notified McKee & Bros. and received from them in payment of the amount determined by the award the sum of some \$28,000. It is true plaintiff alleges that this was done in violation and fraud of her rights, but I can find nothing which will justify me in coming to the conclusion that the directors acted in bad faith or knowingly disregarded the interest of the stockholders of the company.

It may be assumed, so far as this question is concerned, that the directors did not do what was for the best interest of the company, but even if such is the case, the stockholder has no remedy unless actual fraud is shown or such absolute negligence of the apparent interests of the company as to justify the court in holding

that the settlement was made in actual bad faith: *Spering's Appeal*, 71 Pa. 1.

There is nothing in evidence justifying any such conclusion, and therefore we are of opinion that the settlement made between McKee & Bros. and the Chambers-McKee Glass Company must stand as a binding contract between the parties.

As it is apparent that unless this award and settlement is set aside the plaintiffs have no right to an account as prayed for, it is now ordered, etc., that plaintiffs' bill be dismissed at her costs.

For plaintiff, *J. S. & E. G. Ferguson*.

For defendant, *Knox & Reed*.

Court of Common Pleas, WESTMORELAND COUNTY.

SAXMAN BROS. v. PERKINS.

A record of a judgment before an alderman, a transcript of which is filed in the Court of Common Pleas for the purpose of a lien, will not be stricken off for want of jurisdiction where it appears that the plaintiff's demand was that "plaintiff's demand is for \$52.42, a balance on store account."

The transcript of justice filed in the Court of Common Pleas for the purpose of a lien will not be stricken off because it does not show that any proof was offered in support of the plaintiff's claim.

What return of service of summons upon the defendant, who does not appear at the hearing, will be held sufficient to sustain the judgment against him upon a transcript of the judgment filed in court for the purpose of a lien.

Petition praying that a transcript from justice of the peace filed as a lien may be stricken from the record.

Opinion by McCONNELL, J. Filed January 30, 1897.

On the 19th day of October, 1896, the defendant filed his petition, alleging that he had never been summoned and did not know of the existence of the judgment in this case until the 6th day of October. Along with this petition was filed one of George Frowen, alleging that on the 1st day of June, 1896, he had purchased from George Perkins, the defendant, a house and lot in Bradenville, upon which the above judgment is a lien. That he purchased with the understanding that there were no liens against the property, except one owing to another plaintiff, and that he did not know of the existence of this particular judgment until October 6th. He further alleged that "said transcript is defective for the reason,—*first*, that no proof was offered before said justice of said claim, nor does it state the nature

and character of said claim, nor, *second*, does the record show that proof was made of the service of said writ, in order for the justice to give judgment by default." Therefore petitioner prayed that said judgment be stricken from the record.

A rule having been granted to show cause why the prayer of the petitioners should not be granted, the plaintiffs filed answers traversing the allegations of fact substantially and alleging the sufficiency of the record to defeat the application.

At the argument of the rule, it was conceded by counsel on both sides of the controversy that the fate of the petitions depended on the sufficiency of the transcript, and not on any disputed matters of fact *dehors* the record.

The question therefore is raised on a motion to strike off the judgment, because, as is alleged, it is a nullity. The power invoked originates in the authority of this court to control its own records, not in its authority to inspect or supervise the records of an inferior tribunal. This last authority can only be exercised in the proceeding itself, when called into exercise through the well-defined procedure of *certiorari*.

The striking off of a judgment of a justice filed in the Court of Common Pleas for purposes of lien, is not a direct proceeding in the procedure of the judgment itself, but is collateral to it. Therefore, the decisions of the courts in proceedings instituted by *certiorari*, do not necessarily mark the course to be pursued in proceedings to strike off a transcript when filed for the purpose of creating a lien.

The *certiorari* is based on the right to supervise and directly inspect the procedure itself; but the striking off is based on the right to purge the records of the court of that which is a mere blot upon them. Irregularities that would be fatal in *certiorari* may not furnish any warrant for striking off a judgment, to accomplish the mere purpose of wiping a blot from the records.

All the presumptions of regularity that protect a judgment in the Common Pleas from successful attack collaterally, also shield a transcript of this kind from a similar assault. A justice's court in a proceeding of this kind, is regarded as a superior, and not an inferior court. "When the jurisdiction of a *superior* court depends upon facts not appearing of record, such facts will be presumed in a collateral proceeding. . . . If the facts necessary to give jurisdiction to an *inferior* court do not appear in the record, the judgment will be held void in a collateral proceeding:" 12 Am. & Eng. Ency. 147.

The same authority says: "Justice's courts have been held to be superior courts in Connecticut, Pennsylvania, Mississippi, Vermont and Texas:" Pp. 1470 and 270, and numerous Pa. cases there cited.

We therefore turn to the transcript, to see whether, as the record of a superior court, it is vulnerable or invulnerable to the attack here made upon it.

First.—It must of course appear that the justice had jurisdiction of the subject-matter of the suit, because the 4th section of the Act of 1810, Purd. Dig. 1146-121, provides that he shall state in his docket "the kind of evidence upon which the plaintiff's demand may be founded, whether upon bond, note, penal or single bill, writing obligatory, book debt, damages on assumption or whatever it may be."

As was said by Judge BURNETT in *Cook v. Minick*, 1 Pa. C. C. R. 603, "the purpose of that requirement is two-fold, that the record may show his jurisdiction and the plaintiff's cause of action, so that the former may appear on *certiorari* and the latter preserved on appeal."

The docket entry designed to show the kind of evidence on which the plaintiff's demand is founded (to the end that jurisdiction of the magistrate may appear) is as follows: "Plaintiff's demand is for \$52.42, a balance on store account." In the case of *Holden v. Wiggins*, 3 P. & W. 469, the Supreme Court held that "98 due on book account" sufficiently set out a cause of action. "It is considered" (says Justice KENNEDY) "that this statement made by the justice, would have been deemed sufficient, in case his judgment and proceedings had been brought before the proper tribunal by writ of *certiorari* for revision, and may, therefore, be considered sufficient to supply the place of a statement in the Court of Common Pleas upon an appeal." This is not distinguishable in substance from the case under consideration. We therefore think that the argument of the defendant's counsel, which alleges that it does not appear that the justice had jurisdiction of the subject-matter of the action, is not well founded. It does sufficiently appear in the transcript.

Second.—It must not only appear that the justice's court has jurisdiction of the subject-matter of the suit, but the justice must acquire jurisdiction of the person of the defendant by service of lawful process. This should appear of record. The 2d section of the Act of 1810, Purd. Dig. 1129-46, provides as follows: "And the service on the defendant shall be by producing the original summons and informing him of the contents thereof, or leaving a copy

of it at his dwelling-house in the presence of one or more of his family or neighbors," etc.

The transcript, after setting forth the issuance of the summons and the time when it is returnable, contains the following: "And now, December 20, 1894, summons returned on oath served a true copy of original summons on defendant by leaving a true copy of original summons at defendant's residence with an adult member of defendant's family, at the same time producing the original and informing _____ of the contents thereof. H. Fry, constable." This certainly shows a substantial compliance with the mode of service provided for in the portion of the statute quoted above. In the case of *Sloan v. McKinstry*, 18 Pa. 120, the transcript only showed the following entry, "returned on oath," not even saying that the summons had been served. It was held that the judgment was not void, as the lower court had held. Justice ROGERS says, on page 122, "The decision is founded on an entire misapprehension of the law. The judgment is not void; if anything it is voidable merely, and might have been reversed. If any point is settled it is that a voidable judgment is binding and conclusive until reversed or set aside by a legal proceeding. It is needless to cite authorities in support of a principle so plain."

But as we understand the contention of defendant's counsel, it is not that the mode of service indicated in the above return is even an irregular one, but that the record does not show that it was actually made, for it is said that in the case of a judgment by default, as this one purports to be, there must be proof of the service of the summons. The 16th section of the Act of 1810, Purd. Dig. 1132-59, provides as follows: "In case the defendant does not appear upon summons on the day appointed, the justice may on *due proof by oath or affirmation of the service* of his summons as aforementioned, proceed to give judgment by default publicly against such defendant," etc.

In addition to the extracts quoted above the transcript contains the following—showing the nature of the judgment entered: "And now, December 26, 1894, George Saxman appears for plaintiff. Defendant does not appear. Therefore judgment publicly by default, in favor of plaintiffs, and against defendant for \$52.42 debt and \$4.53 costs." It therefore plainly appears from the transcript that the judgment is a judgment by default. It also plainly appears from the statute that the justice is authorized to render such a judgment only "on due proof by oath or affirmation of the service of his summons." Must it appear in the transcript that this has

been done, and, if it does not there appear, what is the consequence, does it render the judgment *void* or only *voidable*?

We think it should appear in the transcript, according to the weight of decisions, that there was due proof of service before entering judgment by default, but we do not think that its failure to thus disclose that fact renders the judgment void, but only voidable.

But does it not so appear in this case? The transcript says: "Summons returned on oath, served a true copy." The justice certifies that the above is a true transcript "of the *proceedings* had before him in the above suit." In the face of this, how can it be said that there was not due proof on oath of the service of the summons?

The case of *Bell v. Borough of Oakdale*, 43 PITTSBURGH LEGAL JOURNAL, 817, is cited to show that a record merely stating "summons returned on oath," is not sufficient to sustain a judgment against a defendant who does not appear. Judge WHITE did, in that case, hold that one of two things is necessary when the defendant does not appear: (1) An oath administered and certified to by the justice on the back of the summons, or (2) the constable sworn, and his testimony taken down by the justice and made a part of the record.

If we were considering a case of *certiorari*, as Judge WHITE was, a consideration of that opinion would be more important than it now is. Uninfluenced by the reasons therein contained, we would have been inclined to think that the thing of substance was, that it should appear by the certificate of the justice that the return of service was made on oath, and that when it appeared in the body of the transcript that the summons was returned on oath, and the justice certified in the usual form "that the above is a correct transcript of the *proceedings before me* in the above suit, and of record on my docket," that he did sufficiently certify that he had received due proof on oath of the service of the summons. How far such an impression might be modified by the case cited, it is not material to consider, for the proceeding before Judge WHITE was *certiorari*—a direct proceeding in the case itself, in which both *voidable* and *void* proceedings are set aside. In such a proceeding more than a transcript comes before the court from the justice "whose duty" (as the statute expresses it), *Purd. Dig.* 798-85, "it shall be to certify the whole proceeding had before him, by sending the *original precepts*, a copy of the judgment and execution or executions if any be issued." Judge WHITE's opinion is largely based on the return indorsed on

the original precept—a thing we cannot inspect here.

In case of *Cockley v. Rehr*, 2 Dist. Rep. 381, there was a motion to strike off a judgment, because, as was alleged, it was void. The transcript disclosed a personal service, but failed to state how the service was made. Judge SWARTZ said: "We cannot sustain this contention, because the judgment is not void, but only voidable. The transcript discloses a personal service, but fails to state how the service was made; this, at most, is but an irregular service, and the judgment under it is not void, and the defendant cannot impeach it except by direct proceedings."

An examination of the original summons may show that the service was in strict conformity with the legal requirements. We cannot condemn the proceeding without giving the justice an opportunity to submit his entire record for inspection. This is done by *certiorari*. If the entire record in the case, in this case, were brought up, it might disclose an affidavit of service indorsed on the summons attested with the *jurat* of the justice. In the case of *Dornes v. Staley and Wife*, 2 Dist. Rep. 382, there was a rule to strike off a judgment. The judgment against the wife failing to show the facts essential to the support of a judgment against a married woman, was declared void as to her and stricken off—but the court refused to strike off the judgment against Cyrus Staley. Judge SCHUYLER said: "As to him it is not void; if not perfectly valid, it is at most only voidable or irregular, and is conclusive till reversed or set aside by legal proceedings."

In the case of *Shupp v. Orts*, 1 Kulp, 308, Judge RICE says: "When a justice has not jurisdiction, the twenty-day rule as to *certiorari* does not apply, but to hold that an irregularity or defect in his subsequent proceedings, which would reverse on *certiorari* if taken out in due time renders the judgment void for want of jurisdiction, would be a refinement which would practically nullify the plain terms of the statute."

Even when the record of a Maryland justice did not show that all the preliminary steps of notice, etc., had been taken, it was held by our Supreme Court on a collateral consideration thereof, that the presumption was that all things had been done to authorize the entry of judgment: *Morgan v. Neville*, 74 Pa. 53. Justice AGNEW, on page 58, says: "But the 42d section provides, if the defendant or garnishee shall not show cause against the attachment, the justice may condemn the property, *provided he is satisfied by the oath of the plaintiff, or by*

other proof, that the notice required above has been given. As the proof is thus, by the statute, a mere preliminary to judgment and not a return of process to appear in the record, but is heard at the trial, the presumption in favor of judicial acts, that they have been rightly done, comes to the aid of this proceeding. We cannot presume that the justice gave judgment contrary to the statute and to his duty, but must presume he was satisfied by the oath of the plaintiff or other proofs, that the plaintiff had done all that is requisite to entitle him to judgment."

Our statute says: "The justice may on due proof by oath or affirmation of the service of his summons, proceed to give judgment by default, publicly against such defendant." All that was said about the judgment of the Maryland justice can with the same force be said about the judgment of one of our own justices, entered pursuant to the act quoted.

Therefore, if the transcript was entirely silent on the subject of the proof of service by oath as a preliminary to the entry of judgment by default, the presumption of regularity would supplement that transcript in a proceeding of this kind and make it regular. The transcript does, however, say that the summons was "returned on oath."

We therefore think that it sufficiently appears that the justice acquired jurisdiction of the defendants.

It appearing that the justice had acquired jurisdiction over the subject-matter of the suit, and over the parties, we need spend but a little time in disposing of the remaining question, viz: (3) That because the record does not show that any proof was offered and received in support of the plaintiff's claim before the entry of the judgment, the transcript should therefore be stricken off. Assuming that this lack in the record would call for a reversal and *certiorari*, it by no means follows that it warrants the striking off of the transcript. The presumption of regularity in procedure—above spoken of—is equally applicable here and supplements the transcript so as to forbid the striking off of the transcript. To warrant this summary disposition of a judgment, it must appear on its face to be void. All the cases approving of such a course are based on that ground: *Merold v. Rush Twp.*, 5 Dist. Rep. 515. A merely voidable judgment must be reversed by *certiorari*. "It is a rule to which there is no exception, that when a judgment is given by a court or judge having jurisdiction of the subject-matter, its regularity cannot be inquired into in a collateral proceeding. If the justice was

wrong in issuing this attachment, and if the defendant did not waive the error by appearing, still nobody but the defendant himself had a right to complain of it, and even he could get redress only by *certiorari*. His acquiescence in the judgment, without taking steps to reverse it, made it as good and valid as if all the prerequisites of the law had been complied with:" *Bilings et al. v. Russel*, 23 Pa. 191.

"It is settled law that the regularity of a judgment of a court having jurisdiction of the subject-matter cannot be questioned in a collateral proceeding. Although a judgment recovered before a justice of the peace be irregular, yet if he has jurisdiction of the subject-matter, the only redress of the defendants therein is by *certiorari*:" *McDonald v. Simcox*, 98 Pa. 623; *County of Cumberland v. Boyd*, 113 Id. 52.

The omission from the transcript of a statement that proof was received is at most an irregularity. The law presumes that it in fact was received, and in a proceeding of this kind that presumption is conclusive. It was expressly decided in the case of *Dornes v. Staley and Wife*, 2 Dist. Rep. 332, that the fact "that the transcript does not show that the justice of the peace took testimony in support of the claim is not ground for striking off the judgment."

On a similar motion in the case of *Cockley v. Rehr*, 2. Dist. Rep. 331, the same reason was urged. Judge SWARTZ says: "It is also argued that the transcript shows that no proof of the plaintiff's demand was taken. This is a matter for consideration on *certiorari*; it will not justify an interference with the judgment in the present proceeding."

We have no difficulty in reaching the same conclusion in this case.

This disposes of all the questions raised in the argument of the motion.

And now, January 30, 1897, the motion to strike off the transcript and the judgment entered thereon in the above-entitled case is refused.

For plaintiffs, *Gaither & Woods*.

For defendant, *D. C. Ogden*.

—The utmost care to keep the insulation of dangerous electric wires perfect at places where people have a right to go for work, business, or pleasure, is held necessary in *McLaughlin v. Louisville Electric L. Co.* (Ky.), 34 L. R. A. 812, although at other places very great care may be deemed sufficient. And the fact that the insulation of the wires is very expensive or inconvenient is no excuse for failure to make it perfect at points where people have a right to go for work, business, or pleasure.

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Supreme Court, Penn'a.

YARYAN COMPANY v. PENNSYLVANIA GLUE COMPANY, Limited.

Amendments to an affidavit of defense will not be granted at trial where the proposed amendment introduces a radical change in same respects of the written contract sued upon, and sufficient ground for admitting the testimony is not included in the offer.

In an action upon a contract to recover for the sale of a machine by a limited partnership formed under the Act of 1874, where it appears that the defendant kept the machine, paid part of the purchase price and defended on the ground that the plaintiff had not carried out its part of the contract in the manner in which the machine was erected, the condition in which it was left, it is estopped from the further defense that plaintiff has not complied with the Act of 1874 because the contract was not signed by at least two of the plaintiff's managers.

Appeal of the Pennsylvania Glue Company, Limited, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of *assumpsit* in which the Yaryan Company was plaintiff.

The facts and the assignments of error are sufficiently set forth in the opinion of the Supreme Court, *infra*.

For appellant, *A. Leo. Weil* and *C. M. Thorp*.
Contra, *S. Schoyer, Jr.*, and *S. B. Schoyer*.

Opinion by McCOLLUM, J. Filed April 12, 1897.

The plaintiff on the 13th of May, 1892, sold to the defendant a "Tripple-Effect Yaryan Evaporator," for \$7,000; one-half thereof to be paid on delivery, and the other half to be paid in three months thereafter. Certain work was done in connection with the erection and operation of the evaporator in the defendant's factory in Chicago, by persons sent there by the plaintiff on an understanding with the defendant that the work should be done at the expense of the latter. On the delivery of the evaporator the defendant paid one-half the price of it, but it has not paid anything on account of the other half, or of the work done as aforesaid. To this extent the parties to the suit agree. It was averred in the affidavit of defense, and specifically denied in the replication to it, that the

plaintiff, at the time of the purchase, represented to the defendant that the evaporator was in first-class condition. It was further averred in the affidavit of defense that the plaintiff agreed to put the evaporator into defendant's factory at Chicago, and "do all things necessary to erect it there and put it in perfect working order," to which the plaintiff replied that it did not so agree, but that it promised, at the defendant's request and expense, to send a competent man there to "direct the defendant in erecting and starting the machine." The defendant did not directly aver in its affidavit that the plaintiff agreed to clean the evaporator before delivering it, but it claimed on the trial that the plaintiff agreed to do so, and it submitted some evidence which gave color to the claim. The averments respecting the delay in delivering the machine and the loss occasioned thereby were abandoned on the trial, and need not be considered here. The fact is that the entire defense to the plaintiff's claim was based on the defendant's averment that the plaintiff agreed to erect and put the evaporator in perfect working order in the defendant's factory in Chicago, and on the latter's allegation on the trial that the plaintiff agreed to clean the evaporator before delivering it. These raised the pivotal questions in the case, and it was essential to an extinguishment of, or a deduction from, the plaintiff's claim, that the defendant should sustain its averment or allegation, or both, by competent evidence. The plaintiff denied the existence of any such agreements as were set up by the defendant, and contended that the only agreement between them was embraced in the letters of May 13th. One of these letters was written by Edward R. Hewitt, who was the defendant's purchasing agent, and the other was written by A. G. Paine, who was the president of the plaintiff company. The latter was written in response to the former, and specified the price and capacity of the evaporator, the terms of payment, and the place and time of delivery. On the 17th of May, Hewitt, wrote to Paine, acknowledging the purchase, expressing satisfaction with the terms of it, and requesting a postponement of delivery for the accommodation of the purchaser. The delivery was to be made on cars at Providence, R. I., where the evaporator was at the time of the sale. The plaintiff's contention that the letters referred to contained the entire contract between the parties was supported by the testimony of Paine, Hewitt and Hill. The latter was present when the contract was made. He testified, *inter alia*, that the evaporator was a second-hand machine, and sold as such, and that Hewitt was told that, after it was set up ready to

operate in Chicago, they might have to wash it out, "because it probably had some dirt in it." An opportunity was given to Hewitt to inspect the evaporator before buying it, but he declined to do so, and said that "he knew the machine very well, having the size and the heating apparatus, and the pumps," etc. Although Hewitt, in making the purchase, represented the defendant company, and was one of its directors, he testified frankly in regard to the transaction, and without any manifestation of bias. He was the defendant's principal witness, and he testified that the letters contained the entire contract. He was positive that the plaintiff promised to send a man to Chicago, at the defendant's request and expense, to put the machine in good working order, and that the promise was faithfully kept. He thought, but was not certain, that the plaintiff was to clean the machine before it was delivered, and he testified distinctly that the evaporator had the capacity it was warranted to have in Paine's letter of May 13th. It being conceded in the testimony of the defendant's principal witness that the contract was in writing, and by the defendant company that it was made with him as its representative, we would naturally expect that the defense to the action on the contract would have been based upon an alleged breach of it. But so much of the defense as was of this nature was abandoned on the trial. It was finally admitted that the machine had the guaranteed capacity, and the undisputed evidence was that the delay in delivery was at the request and for the accommodation of the purchaser. Did the plaintiff agree to clean the evaporator before delivering it? Did it agree to put the evaporator in good working order in the defendant's factory in Chicago? These were the questions of fact submitted to the jury, and the only questions for their consideration under the evidence in the case. If the plaintiff agreed to do so, and failed to carry out its agreement, it became liable to the defendant for the damage caused by its failure, and so the jury were instructed. It was made clear by the verdict that the plaintiff did not so agree, and therefore we need not consider the rulings of the court in regard to damages.

Nine of the 30 specifications of error are based on excerpts from the charge, 2 on the refusal to affirm the defendant's first and second points, 1 on the denial of the motion to amend the affidavit of defense, 1 on what the court said to the defendant's counsel in regard to damages, and 17 on rulings upon offers of evidence. Many of these offers were repetitions, with slight and immaterial variations, of previously rejected

offers. The offers were to prove matters not specified in the affidavit of defense, and representations and promises alleged to have been made by the president of the plaintiff company, some time prior to the making of the contract, respecting the condition of the evaporator, and the company's willingness, in the event of a sale, to put it in perfect working order. The purpose was to add to and enlarge the terms of the written contract, which was conceded, by the persons who represented their respective companies in making it, to clearly include and express the entire agreement between the parties. While the learned trial judge recognized and enforced the general rule that prior conversations between the parties are not admissible to vary the terms of a written contract, he allowed the defendant to submit evidence in support of its claim that the plaintiff, when the contract was made, agreed to clean the evaporator and put it in the Chicago factory in perfect working order. The defendant was therefore permitted, under the ruling of the court, to introduce competent evidence in support of the claim on which its whole defense rested. In denying the motion to amend, the court said: "The application to amend the affidavit of defense cannot be allowed, for two reasons: (1) Under our rules of court, an affidavit of defense cannot be amended or supplemented at the trial. (2) It is a radical change, in some respects, of the written contract, and sufficient ground for admitting such testimony is not included in the offer." To this it may be added that it is not clear that the amendment was demandable of right under the Act of 1806. Amendments beyond the plea are at common law, and to be tested by a legal discretion. *Austin v. Ingham*, 4 Yeates, 347, and *Diehl v. Insurance Co.*, 58 Pa. 444.

Did the court err in refusing to affirm the defendant's first point? The point requested the court to hold that the plaintiff could not recover because the contract for the purchase of the evaporator was not signed by at least two of the managers of the defendant company, as required by section 5 of the Act of June 2, 1874. The question raised by the refusal of the point must be considered and determined in the light of previous adjudications, and the obvious and undisputed facts of the case in hand. The cases cited as sustaining this branch of the defendant's contention are *Melting Co. v. Reese*, 118 Pa. 355, and *Walker v. Brewing Co.*, 131 *Id.* 546. The case first cited was an action of *assumpsit* for the recovery of damages for the breach of a verbal contract made by the plaintiff with the chairman of the board of managers of the de-

fendant company for the sale by the latter to the former of 600 tierces of oleomargarine oil for \$13,620. The plaintiff drew and sent his check for the amount, but the company refused to deliver the oil. On the trial the plaintiff recovered a verdict against the company for \$3,447; that being the difference between the price he was to pay for the oil and the market price of it at the time he should have received it. On appeal to this court the judgment entered on the verdict was reversed on the ground that it was not within the power of the chairman of the board of managers to bind the company by such a contract. *Walker v. Brewing Co.* was an action of *assumpsit*, in which the plaintiff offered to prove that the defendant's architect and agent in the construction of its brewery building requested him to submit a bid for the asphalt work; that he did so, and that soon after the bid was submitted he was informed by the architect and by one of the managers that the defendant had accepted it and let the contract to him; that a contract and bond was presented to him, which he signed, and that soon thereafter he was notified by the architect that the defendant had signed the contract, and that he should get his material and begin the work; that, relying upon the representations of the architect, he procured the materials and necessary apparatus and began the work, but that he was compelled by the defendant to abandon it. The plaintiff proposed to follow this evidence by evidence that he "was to sell his materials at great sacrifice on the cost of the same, with the cost of the transportation, and thereby suffered great loss." The offers were rejected, and, no other testimony being presented, there was a verdict and judgment for the defendant, which judgment was affirmed on appeal. It will be noticed that in these cases the defendant company promptly repudiated the agreement, and did not receive any money, property, or benefit under it. In the case now under consideration, the defendant company, through its agent, purchased of the plaintiff a machine that was essential to the proper prosecution of its business, and agreed to pay one-half the price of the same on delivery, and the other half in three months thereafter. The machine was delivered, and the first payment made according to contract. It has been in the possession of and operated by the defendant, as owner, since September 1, 1892. No officer or member of the company is shown or claimed to have objected to the purchase before, when, or since it was made. Presumably, each and all of them approved and agreed to it. The company has affirmed the purchase by its acceptance and

continued use of the machine, by payment on account of it, and by its affidavit of defense and its offers of evidence. It plainly appears from its acts and from its attitude on the trial that it claims title to the machine by virtue of its agreement, and exemption from liability for the price because the agreement was not executed in accordance with the Act of 1874. We think that the defendant is, upon its own showing and the admitted facts of the case, estopped from setting up the defense based on its first point. It cannot keep the machine and be justified in its refusal to pay for it. It cannot, under the circumstances, successfully urge its non-compliance with a requirement of the statute as a bar to the plaintiff's just claim. We have carefully examined and considered the rulings and instructions complained of, and are not convinced that they furnish adequate cause for reversing the judgment. We therefore overrule the specifications of error.

Judgment affirmed.

VOIGT et al. v. WALLACE.

The owner of a lot built on part of it, and then conveyed the other part, making the middle line of the wall of the building which he had erected the dividing line between the two lots, calling it a party wall in the description and stipulating in the deed that the grantee, his heirs and assigns, should not make use of the wall for building without paying a stipulated price therefor. He then conveyed the remaining lot to another party, who subsequently became the owner of the lot first sold, and used the wall. In an action by the original owner against the person in whom the lots subsequently became vested for the price stipulated in the original deed: *Held*, that under the Act of April 10, 1849, relating to party walls, the right of action on the stipulation in the deed passed to the grantees thereof and the original owner could not recover.

Appeal of Charles H. Voigt, Richard Floyd and Amanda F. Voigt, executors of Louis H. Voigt, deceased, plaintiffs, from an order of the Court of Common Pleas No. 1, of Allegheny county, refusing judgment for want of a sufficient affidavit of defense, in an action of *assumpsit* brought by Louis H. Voigt against John C. Wallace, to recover \$1,950.75 for the use of a party wall.

The facts of this case are set forth in the opinion of the Supreme Court. The defendant filed an affidavit of defense, in which, after citing the deed from the plaintiff to himself, he claimed that "the right to demand and receive contribution from the owner of the adjoining property, viz.: the lot conveyed to Andrew Fisher by the said Voigt and wife, on December 20, 1892, passed to affiant by the conveyance to him by said Voigt and wife on February 8, 1894."

The court discharged a rule for judgment for

want of a sufficient affidavit of defense on the ground that the wall was a party wall, and that by the Act of April 10, 1849, the right to recover for its use was in the owner of the dominant lot. Whereupon the plaintiff took this appeal, assigning for error this action of the court.

Subsequently, upon suggestion of the death of Louis H. Voigt, plaintiff, his executors were substituted as plaintiffs.

For appellants, *A. M. Brown and John S. Lambie.*

Contra, McClung & Evans.

Opinion by FELL, J. Filed January 4, 1897.

This appeal is from an order discharging a rule for judgment for want of a sufficient affidavit of defense. The action was to recover for the use of a party wall. Prior to 1892, L. H. Voigt purchased a lot of land with a front of 53 feet and 10 inches on the north side of Liberty street, Pittsburgh. On the easterly part of the lot there was a brick building 20 feet wide. Voigt built a warehouse on the westerly part, with side walls 22 inches thick. On December 20, 1892, he conveyed to Andrew Fisher 20 feet and 11 inches of the easterly part of the lot. This conveyance included the ground covered by the old building and 11 inches of the 22 covered by the east wall of the new building, and made the line between the lot conveyed and that retained by him the middle of the 22-inch wall. The lot conveyed is described as beginning "at the center of a party wall common to the lot herein conveyed and the lot next adjoining to the west, thence northerly through the center of said party wall," and the deed contains this proviso: "Provided, however, that this conveyance shall not be construed to give the party of the second part, his heirs or assigns, the right to use any part of the party wall hereinbefore described for any building hereafter to be erected upon the lot of ground hereby conveyed, or for any extension or increase in size of the present building standing on said lot of ground, until he or they shall have paid to the parties of the first part, their heirs or assigns, the sum of \$1,950.75, being one-half of the cost of said party wall. It being distinctly agreed and understood that this conveyance does not give to the party of the second part, his heirs or assigns, the right to use the said party wall, which has recently been erected, except for the building now standing on the lot hereby conveyed in its present condition." In 1894 Voigt conveyed to Wallace, the defendant in this case, the westerly part of the lot, the east line running through the middle of the party wall. In this deed there was no reservation of

the wall, or of the right to compensation. In the same year Fisher conveyed the easterly lot to Wallace, reciting in the deed the reservation in the deed from Voigt to him. In 1895, Wallace, being the owner of both lots, erected a building on the easterly lot, using the party wall, and this action is brought by Voigt's executors to recover from him one-half of the cost thereof. The essential facts are these: The owner of a lot built on one part of it, and then conveyed the other part, making the middle line of the wall of the building which he had erected the dividing line between the two lots, calling it a party wall in the description, and stipulating in the deed that the grantee, his heirs or assigns, should not make use of the wall for building without paying a stipulated price therefor. He then conveyed the remaining lot to another party, who subsequently became the owner of the lot first sold, and used the wall.

Before the Act of April 10, 1849, the right of the first builder to compensation for the use of a party wall was regarded as a personal right, which did not pass from him by his conveyance of the house: *Dannaker v. Riley*, 14 Pa. 436. The Act of 1849 provides that "in all conveyances of houses and buildings the right to and compensation for the party wall built thereunto shall be taken to have passed to the purchaser unless otherwise expressed." Since the passage of this act the right of the first builder to a party wall is considered an interest in the realty, which passes to the grantee of the land: *Knight v. Beenken*, 30 Pa. 372. If the wall in question was a party wall within the meaning of the Act of 1849, the right of Voigt to payment when it should be used passed by his conveyance to Wallace, and became vested in him. If Fisher had used the wall, Wallace could have recovered of him, and when Wallace became the owner of both lots the duty to pay and the right to demand payment were both his. When the wall was built, it was not a party wall by statute. It was built wholly on the land of the builder, and not by virtue of a statute giving the first builder the right to enter upon the land of an adjoining owner, which applies only where the wall is built on land owned by different parties. Fisher took the easterly lot subject to the easement of support of the division wall, but with no duty imposed by statute to pay for the use of the wall. The Act of 1849 applies, however, to a party wall, whether made such by statute, prescription, or agreement. It provides that in all conveyances of houses and buildings the right to and compensation for the party wall built therewith shall pass to the purchaser, un-

less otherwise expressed. The law was intended to prevent the inconvenience and injustice resulting from the title to the wall being in one person and the right to compensation outstanding and a secret claim in the hands of another. The effect of the conveyance from Voigt to Fisher was to make the wall a party wall by agreement. The conveyance included one-half of the land on which the wall stood, thus fixing the line so that the wall should be for the benefit of both lots, and creating cross easements of support. The parties declared the wall to be "a party wall to the lot herein conveyed and the lot next adjoining to the west," and by reserving the right to compensation they invested it with the statutory incident of a party wall. In the statement of claim filed the plaintiff avers that by the delivery of the deed and its acceptance by Fisher "the said wall became a party wall." If it was a party wall, the Act of 1849 operated on the conveyance from Voigt to Wallace, and passed the right of compensation to him, and that ended Voigt's right to recover from any one for the use of the wall.

Judgment affirmed.

[See next case.]

VOIGT v. FISHER.

Under the Act of April 10, 1849, the right of the first builder to a party wall is an interest in the realty, and it passes to the grantee of the land, unless otherwise expressed.

The first builder cannot maintain an action for the use of a party wall, after he has parted with the land.

Appeal of Charles H. Voigt, Richard Floyd and Amanda F. Voigt, executors of Louis H. Voigt, deceased, plaintiff, from the action of the Court of Common Pleas No. 1, of Allegheny county, in dismissing a rule for judgment for want of a sufficient affidavit of defense, in an action of *assumpsit* brought by Louis H. Voigt against Andrew Fisher, to recover \$1,950.75, for the use of a party wall.

The facts of this case are the same as those set forth in *Voigt v. Wallace*, ante, p. 375.

The defendant filed an affidavit of defense, averring that he had not used the wall, and that by reason of the conveyance by the plaintiff to John C. Wallace, he, Wallace, had become the owner of both lots, and thereby acquired the right to use the wall without paying Voigt any portion of the cost.

The plaintiff took a rule for judgment for want of a sufficient affidavit of defense which the court discharged, on the ground that the wall was a party wall, and under the Act of April 10, 1849, the right to recover for its use was in the owner of the dominant lot. Where-

upon the plaintiff took this appeal, assigning for error this action of the court.

Subsequently upon the suggestion of the death of Louis H. Voigt, the executors were substituted as plaintiffs.

For appellants, *A. M. Brown and John S. Lambie.*

Contra, J. S. & E. G. Ferguson.

Opinion by FELL, J. Filed January 4, 1897.

This case was argued with the case of *Voigt v. Wallace*, in which the opinion of the court has been filed. For the reason stated in that opinion the judgment in this case is affirmed.

[See preceding case.]

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

MILLROY v. PITTSBURGH, BESSEMER & LAKE ERIE RAILROAD CO.

Where the plaintiff's property consists of a lot 60 by 120 feet fronting on a 50-foot street, with a two-story frame dwelling, and the railroad track, as located across the rear end of the lot, will be 19 feet from the nearest corner of the house, and the access to and from the property is not materially interfered with, a preliminary injunction to restrain the construction of the road will be refused.

No. 283 June T., 1897. Application for preliminary injunction.

The plaintiff is the owner of a lot 60 by 100 feet in the borough of Turtle Creek, fronting on Larimer avenue and extending back to a 20-foot alley, upon which is erected a two-story frame dwelling-house. The defendant's railroad is located across the rear end of the lot, cutting off a triangular corner. The road is to be constructed upon trestle work and will be about 36 feet above the surface of the ground and within 19 feet on a horizontal line from the nearest corner of the house to the rail. The access to and from the property is not materially interfered with.

For plaintiff, *Edwin W. Stowe.*

For defendant, *J. H. Beal.*

Opinion by STOWE, P. J. Filed April 14, 1897.

If we are to consider the case of *Swift and Given's Appeal*, 111 Pa. 516, as authority, it seems to me that the facts of this case, as shown by the affidavits filed, bring it fairly within its principle. If the term "curtilage" is to have any meaning other than so much ground as may be *indispensable* to the use and occupancy of a dwelling it would seem that the occupation and use of the plaintiff's ground in the manner

proposed by defendants would be within the prohibition of the Act of 19th February, 1849; and in any event it seems to me that it will "essentially interfere with the proper enjoyment of plaintiff's house as a dwelling place." The fact that the track is to be built some thirty-six feet above the surface of the ground and within nineteen feet on a horizontal line from the house, is to my mind much worse, so far as danger and annoyance is concerned, than if the track was on a level with the house and much closer to it. But as the interpretation of the term "curtilage," in *Lyle v. Railroad Co.*, 131 Pa. 437, seems to indicate a disposition on the part of the court to limit the prohibition of the said act to the ground actually necessary to render a dwelling inhabitable without reference to its convenience or safety, if not to the house alone; and the result of a preliminary injunction would be a matter of such serious consequence to defendant, we feel constrained to refuse the application now made for a *preliminary* injunction, without reference to what our opinion may be upon final hearing.

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

CITY OF ALLEGHENY v. FALCK.

The Act of May 16, 1891, relating to street improvements, supersedes all local laws relating to such improvements, except as far as may be necessary to complete improvements then under way, or to collect assessments made in pursuance of local laws for improvements before the passage of that general law.

Nos. 27, 33, 35 and 36 April T., 1897. Case stated.

Opinion by WHITE, J. Filed April 5, 1897.

These assessments were for a main sewer. The sewer was constructed, and the assessments made, in pursuance of the local acts relating to Allegheny City, prior to the Constitution adopted in 1874.

The Act of 1st May, 1861, P. L. 667, gave the councils of the city power, "when they may deem the same necessary, to cause sewers to be constructed in any street, lane, etc.," of the city, and for the cost and expenses thereof, "to make assessment upon all properties in said city, which may seem to them likely to be benefited thereby, fairly and equitably, in proportion to the benefit received." The assessment was to be made by a commission of three persons to be appointed by councils.

The supplement of 1st April, 1868, P. L. 550, provided for a commission, to divide the city

into sewer districts, for main sewers, and the commission was authorized to make assessments on all lots in the district, and all lots abutting on the street where the sewer was constructed, and these abutting lots were to be "assessed a special rate on the foot front, which shall be assessed upon the superficial area," which special rate was to be fixed by councils by ordinance.

Another supplement, 24th March, 1869, P. L. 498, provided "that for defraying the cost and expenses of construction of main sewers, there shall be levied and collected a special tax by an equal assessment upon the feet front of all property bounding and abutting on the sewer," and if that was not sufficient to pay the whole cost, the city was authorized to issue bonds for the payment of the balance.

The first Act, that of 1861, provided for an assessment of the foot front, but in proportion to the area of the lot. The Act of 1869 had the foot front rule without that qualification. In pursuance of that act the councils passed a general ordinance fixing as the rule in all cases, two dollars per foot front. This was only in reference to *main* sewers, and all sewers of 20 inches calibre, or more, by the act were declared main sewers.

By the Act of 9th April, 1872, P. L. 1051, the councils were authorized to construct "any sewer deemed necessary," whether included in the general plans or not.

The ordinance fixing two dollars per foot front, was the utmost that could be assessed upon any property, if the assessments did not pay the whole cost, the city had to pay the balance, if the sewer did not cost two dollars per foot, of course the property holders could only be assessed the actual cost. The cost of this sewer was \$9,989.63, the total assessment upon property holders abutting on the street, \$5,358.84, and upon the city \$4,630.79, the balance of the cost.

These local acts have never been repealed. Many of their provisions are in conflict with the general municipal Act of 16th May, 1891. But it has not yet been decided that that act repeals all local laws inconsistent with it.

These acts for Allegheny City have been in operation for nearly thirty years, many sewers have been constructed under them, and several cases have been before the Supreme Court, and sustained.

The trend of recent decisions of the Supreme Court is most decidedly adverse to many features of these local acts. Recent judicial decisions and legislation have been decidedly against the foot-front rule. It has been abandoned in

reference to all street improvements, including sewers, by the Act of 16th May, 1891. But that act does not repeal pre-existing local laws. However, as that is a general law for the entire State, and embraces all municipalities, it seems to me it should be held as superseding all local laws, except so far as may be necessary to complete improvements then under way, or to collect assessments made in pursuance of local laws for improvements, before the passage of that general law.

The assessments on Verner road, or street, must have been made under the Act of 1869, for the assessments were not in accordance with the Act of 1861, or 1868. And the ordinance, for the same reason, must have been passed under the Act of 1869. The act provides for "a special tax by an equal assessment upon the feet front, of all property bounding and abutting on the sewer." It does not declare how that assessment shall be made. Under the Act of 1868, assessments were made by the commission, on the superficial area, at a rate to be fixed by councils. Does the Act of 1869 authorize councils to pass a general ordinance fixing two dollars per foot front, for all main sewers in the city, without regard to locality, benefits, cost of sewer, or value of property? Some main sewers are mainly for the benefit of other properties in the sewer district, and not of special benefit to the properties on the street where the sewer is constructed. The size and cost of the sewer will depend largely upon the number of lateral sewers, and the extent of the area to be drained. These are matters that should be considered in fixing the rate of assessment upon the abutting properties. The rule of two dollars per foot front in all cases, is, therefore, arbitrary and unreasonable. It is a procrustean bed for measuring benefits; where the benefits are very great, they are cut down to two dollars per foot front, and where very little, they are stretched to two dollars. I do not think the language of the act,—“an equal assessment upon the foot front,”—means that there shall be an equal assessment upon all sewers; but rather that, in any given sewer, the assessment for the cost of that sewer, should be according to the frontage, upon all the properties.

All local assessments for street improvements and sewers can only be sustained on the theory of benefits; that the property is benefited to the amount of the assessment. The foot-front rule has been sustained in some cases, because it is a reasonably safe rule in measuring the benefits in such cases. But it is not a general rule, and would be unjust and oppressive in many cases. In a doubtful case,—and certainly the local

benefits of a main sewer are in that class,—the property holder has a right to be heard. Under this act and ordinance, the property holder has no hearing, and no right of appeal.

For the reasons thus briefly stated, we are of opinion that the law is with the defendant on the case stated, and judgment is entered for the defendant in the four cases.

To which opinion and judgment plaintiff excepts, and bill sealed.

For plaintiff, *C. P. Lang*.

For defendant, *Wm. M. Hall, Jr.*

Court of Common Pleas, LA WRENCE COUNTY.

ELLWOOD LUMBER COMPANY v. FREY.

Under the 66th section of the Act of March 31, 1860, P. L. 382, a member of a lumber company (in this case the general manager) cannot enter into a contract with a school district for the erection of a school house in his own name, but in reality for the benefit and use of the lumber company if it appear that another member of the lumber company is also one of the school directors, and a bill in equity filed by the company to prevent the general manager from interfering with the plaintiff in the completion of the school house and asking that the defendant be declined to hold the contract in trust for the plaintiff will be dismissed.

No. 3 Dec. T., 1896. Motion to continue special preliminary injunction.

Opinion by MILLER, P. J., 35th District, specially presiding. Filed January 20, 1897.

At the hearing to continue the preliminary injunction it was agreed by the parties by paper filed that the cause be submitted as upon final hearing, upon bill, answer and proofs produced and given in evidence on the motion to continue the special preliminary injunction.

The bill alleges that prior to August 3, 1896, the board of school directors of the Ellwood City school district having resolved and agreed to build a school building for school purposes, solicited bids from all persons desiring to bid on the erection of such building, upon a foundation constructed by the school board. That the plaintiff, desiring to secure the contract for the erection of such building, agreed and arranged with A. C. Frey, one of the defendants, and who was at the time a stockholder, director and general manager in the plaintiff company, to bid in his own name for said contract, it being agreed and understood that the bid to be made was to be made for the use, benefit and advantage of the plaintiff, and that the contract, if awarded on said bid, was for the use, benefit and advantage of the plaintiff, and was to be-

long to and be the property of the plaintiff, who would in all things fulfill and carry out and complete said contract.

That the said A. C. Frey, as general manager for the plaintiff, and in pursuance of said agreement, figured said contract, and made the necessary estimates for preparing a bid for said contract, and did prepare a bid therefor, which he delivered to the school board, and the said school board, upon the receipt and examination of the several bids received for the erection of said building, awarded the contract for such erection to A. C. Frey, upon the bid so made by him, at the sum or price of \$4,799, and on August 3, 1896, the said A. C. Frey entered into a written contract with the said school board for the erection of said building.

That after the making of said contract, the plaintiff purchased large quantities of materials, employed workmen, and paid out large sums of money in and about the fulfilling of the same. That on November 5, 1896, the said A. C. Frey sold his stock in the plaintiff company, and on November 14, 1896, resigned his position as general manager and quit the employ of the plaintiff, and notified the board of school directors and the plaintiff that the said contract belonged to him, individually; and that he was attempting to sell, transfer and assign said contract, and draw money from the said board thereon, and asked for relief,—

1. That the court enjoin A. C. Frey by a special preliminary injunction from interfering with your orator and your orator's employees in complying with and fulfilling said contract, from doing any act, matter or thing under said contract, from selling, assigning or transferring said contract to any other person, and from obtaining and receiving from the school district of the borough of Ellwood City, or its officers, any money on account of said contract, and that on final hearing said injunction be made perpetual.

2. That the court enjoin the school district of the borough of Ellwood City by a special preliminary injunction from paying to A. C. Frey any money on account of said contract, and that on final hearing said injunction be made perpetual.

3. That the court declare and adjudge and decree that said A. C. Frey hold said contract in trust for your orator.

4. That the court make a decree against the said A. C. Frey requiring and directing him to assign and deliver to your orator the said contract.

5. That the court decree the school district of the borough of Ellwood City to pay to your

orator the consideration moneys remaining unpaid on said contract, according to the terms of the contract.

On the filing of plaintiff's bill the court, on November 28, 1896, granted a preliminary injunction upon A. C. Frey from interfering with the Ellwood Lumber Company or its employees in fulfilling said contract, and from receiving from the school district of Ellwood City or its officers any money on account of said contract; and also enjoining the said school district from paying to A. C. Frey any moneys on account of said contract.

The defendant, A. C. Frey, made answer to plaintiff's bill. In his answer he admitted that he had been a stockholder, director and general manager of plaintiff company, and that he had sold his stock and quit the employ of said company as stated in plaintiff's bill. He also admitted that prior to August 3, 1896, the board of directors of the school district of Ellwood City resolved and agreed to build a school building for school purposes, and that they advertised for and received bids for the construction of the same; but he denied that the plaintiff desired to secure the contract for the erection thereof; or that the plaintiff agreed or arranged with him to bid in his own name for said contract for the use, benefit or advantage of said plaintiff. He also denied that it was arranged and agreed that if he was awarded the contract for the construction of said building that said contract was to be for the use, benefit and advantage of the plaintiff, or was to belong to and be the property of the plaintiff, or that the plaintiff was to carry out or complete the said contract in any manner; but, on the contrary, that prior to the letting of said contract, the plaintiff company, believing that on account of the fact that A. C. Grove was a stockholder and director in the plaintiff company, and also a director of the school district of Ellwood City, the plaintiff company could not legally bid for or receive a contract from the said school board or the construction of the said building, requested him to bid for and make said contract in his own name; and that the plaintiff company in consideration of his so doing would furnish him the necessary lumber, and in addition thereto would render him such financial assistance as he might need in carrying out said contract; and that the only interest that the plaintiff company was to have in said contract was what it would derive from the profits accruing to it from the lumber furnished to him for the construction of said building.

He also denied that the plaintiff had furnished any materials for the construction of said build-

ing except upon his request, or had employed workmen or paid out any moneys on account of such construction except what was paid out for him pursuant to plaintiff's promise to render him financial assistance in the completion of his contract with the said school district. He also denied that he was attempting to sell, transfer or assign the said contract; and averred that he was diligently working to complete the same. He further averred that A. C. Grove, who was a stockholder and director in the plaintiff company, and also a member of the school board with whom said contract was made, expressly requested him to take said contract in his own right, and on his own account, which he did; and that plaintiff had no right, title, interest or claim therein, nor any authority or right to intermeddle therewith, and prayed that the bill be dismissed, etc.

The evidence taken on the hearing of the motion to dissolve the preliminary injunction showed that the Ellwood Lumber Company was a corporation duly incorporated under the laws of the State of Pennsylvania, and that its directors were A. C. Grove, A. C. Frey, J. F. Haines, E. M. Carleton and Louis Heller, and its officers, E. M. Carleton, president, J. F. Haines, secretary and treasurer, and A. C. Frey, general manager.

That the only persons connected with the company who ever talked together relative to bidding for the contract for the erection of the school building were A. C. Grove, J. F. Haines and A. C. Frey, and that the principal conversations relative thereto took place between Haines and Frey. The corporation took no action in the matter in its corporate capacity. It was one of the duties of A. C. Frey as general manager to make calculations and estimates, and prepare bids for contracts for the erection of buildings; and when contracts were awarded to the company he superintended the erection and construction of the buildings so contracted for, purchasing materials, employing men to do the mechanical work, and having general superintendence of all buildings constructed by the company.

Mr. Haines testified that after the school board had agreed to build a school building, and after Mr. Frey had fully completed the necessary calculations and estimates for preparing a bid on the part of the plaintiff for the erection of said building, he (Haines) had been informed that owing to the fact that A. C. Grove was a stockholder and director in the lumber company, and also a director of the school board, the lumber company could not legally contract for the erection of said build-

ing, and on that account it was talked over and agreed between himself and Mr. Frey that the latter should bid in his own name for the contract; and if it was awarded to him on said bid the contract was to be for the use, benefit and advantage of the lumber company, which was to fulfill, carry out and complete the same; that after the contract was awarded to Mr. Frey the construction of the said building was carried on in the same manner that any and all other contracts of the lumber company had been; and although he and Mr. Frey worked together in the same office from August 3d to November 14th, carrying on the business of the lumber company, he never knew, or heard until November 14th, that Mr. Frey claimed the contract in his own right and for his own sole benefit.

Mr. Grove's testimony, although not so extended, is substantially the same as Mr. Haines' as to the fact that Mr. Frey was to bid for the contract in his own name, and if it was awarded to him it was to be for the use and benefit of the lumber company.

Mr. Frey denied that he made the bid for the use of the company, or that he had agreed at any time to do so; but that he made it in his own name and right and for his own benefit, with the knowledge, acquiescence and consent of Mr. Grove and Mr. Haines, and at their request; for the reason that the company could not legally take it.

FINDING OF FACTS.

From the testimony of the case we find the following facts:

1. The Ellwood Lumber Company, the plaintiff, is a corporation duly created a body politic and corporate by letters-patent issued by the Commonwealth of Pennsylvania, and by virtue of its charter carries on the business of manufacturing lumber and selling the same and the manufactured products thereof, and contracting for the building and erecting of buildings of all kinds, wood, stone, brick, iron and other materials.

2. A. C. Grove, A. C. Frey, J. F. Haines, E. M. Carleton and Louis Heller were the directors of said corporation on, prior and subsequent to August 3, 1896.

3. A. C. Grove was also at the same time a director in the board of directors of the school district of Ellwood City.

4. A. C. Frey was at the same time the general manager of the Ellwood Lumber Company; and as such general manager it was part of his duties to prepare estimates and submit bids for contracts, which, if awarded, were to be carried

out, fulfilled and completed by said company under his supervision.

5. That shortly prior to August 3, 1896, the board of directors of the school district of Ellwood City, acting for and in behalf of said school district, resolved and agreed to build a school building for school purposes in the borough of Ellwood City, and to that end solicited bids from all persons desiring to bid on the erection of said building.

6. A. C. Frey, A. C. Grove and John F. Haines, desiring to secure the contract for the erection of said building for the Ellwood Lumber Company, agreed and arranged among themselves that the said A. C. Frey should bid in his own name for said contract, but with the understanding and agreement that the bid to be made was to be made for the use, benefit and advantage of the Ellwood Lumber Company, and that the contract if awarded on said bid was to be for the use, benefit and advantage, and was to belong to and be the property of the Ellwood Lumber Company, who in all things was to fulfill, carry out and complete the same.

7. A. C. Frey, in pursuance of the agreement with Grove and Haines, put in a bid in his own name for said contract, and the contract was awarded to him on said bid for the price or sum of \$4,799, and on August 3, 1896, the school district entered into a contract with him for the erection of said building.

8. A. C. Grove was the only member of the school board that had any knowledge of the agreement between Grove, Haines and Frey relative to said bid and said contract.

9. The contract for the erection of the said school building was, in fact, the contract of the Ellwood Lumber Company, and not the contract of A. C. Frey; and the Ellwood Lumber Company, up until November 14, 1896, furnished all the materials, employed all the workmen, made all the sub-contracts and contracted all bills for and about the erection of said building.

10. On November 5, 1896, A. C. Frey sold his stock in the Ellwood Lumber Company, and on November 14, 1896, he resigned his position as general manager of said company, and since that date he has treated the contract as his own, and denied that the Ellwood Lumber Company owned the same; and, until enjoined on November 28, 1896, he was drawing money from the school district on said contract for his own use and benefit.

CONCLUSIONS OF LAW.

Section 66 of the Act of March 31, 1860, P. L. 382 (Pepper & Lewis, 1310, pl. 553), *inter alia*, provides as follows: "Nor shall any member of

any corporation, or public institution, or any officer or agent thereof, be in any wise interested in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of any corporation, municipal or public institution of which he shall be a member, or officer, or for which he shall be an agent, *nor directly nor indirectly interested therein.*"

In *Com'th v. Hancock*, 2 W. N. C. 557, it is held that one who makes profit out of a contract is interested therein under this act.

In *Quinn v. City of Philadelphia*, 4 W. N. C. 69, it is held that one who loans money to a contractor with the city, to be paid out of the proceeds, is as much interested in the contract, and the proceeds, as the contractor himself, and the act applies in such case.

In *re Hazle Township*, 6 Kulp, 491, S. C., 1 D. R. 813, it is held that supplies and materials include horses, wagons and labor, and that the provisions of the act apply to supervisors of roads in townships, and forbid them to employ their own teams or hire their own minor children to work on the public roads of the township.

In the *Borough of Millford v. Millford Water Company*, 124 Pa. 610, it is held that a contract by councils with the water company, a majority of whose directors are councilmen, is within the provision of the act, and that such a contract is illegal and void and no liability can be enforced thereon. Chief Justice PAXSON in the opinion says:

"The Act of 1860 is another of the valuable safeguards thrown around municipalities. It was passed to protect the people from the frauds of their own servants and agents. It may be there was no fraud actual or intended in the present case, but we will not allow it to be made an entering wedge to destroy the Act of 1860."

We therefore conclude as matter of law that under the facts found in this case the contract for the erection of the school building being, in fact, the contract of the Ellwood Lumber Company on the one part, and the school district on the other, is illegal and void, and no liability can be enforced thereon.

The law will not aid any of the parties to an illegal contract in obtaining a collateral benefit which the agreement would give, or aid them in any manner which would promote the object of the agreement: *Kerr on Injunctions*, p. 554.

We are, therefore, unable to grant the relief to the plaintiff prayed for in his bill, and the bill is therefore dismissed.

For plaintiff, *J. Norman Martin*.

For defendant, *M. McConnell, H. N. Marshall and H. K. Gregory*.

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PITTSBURGH, PA., MAY 19, 1897.

In Memoriam.

Tribute of the Bench, Bar and Officials of Allegheny County on the Death of Hon. Thomas Ewing.

The judges of the courts and members of the Allegheny County Bar met in the rooms of the Bar Association on Tuesday afternoon, the 11th inst., to tender final tribute of respect to the memory of the late Hon. THOMAS EWING, President Judge of the Court of Common Pleas No. 2.

The meeting was called to order by President William Scott, who nominated Hon. M. W. Achesson, of the United States Circuit Court, as chairman, and Hon. J. W. F. White, Hon. Robert S. Frazer, Hon. Edwin H. Stowe, Hon. Frederick H. Collier, Hon. Jacob F. Slagle, Hon. John M. Kennedy, Hon. S. A. McClung, Hon. W. D. Porter, Hon. W. G. Hawkins, Jr., Hon. J. W. Over, Hon. Joseph Buffington, Hon. Christopher Magee, Hon. Thomas Mellon, William Bakewell, A. M. Brown, Hill Burgwin, Geo. H. Christy, Josiah Cohen, Chas. S. Fetterman, J. W. Hall, Cicero Hasbrouck, T. J. Keenan, T. C. Lazear, Thomas M. Marshall, Jacob H. Miller, George N. Monroe, N. W. Shafer, J. M. Stoner and M. A. Woodward, Esqs., vice-presidents. The secretaries were Thomas Herriott, James S. Young, John D. Shafer and C. C. Dickey, Esqs.

The committee on resolutions, consisting of S. Schoyer, Jr., D. D. Bruce, J. S. Ferguson, D. F. Patterson, John S. Robb, W. B. Rodgers and D. T. Watson, Esqs., reported the following minute, which was unanimously adopted, and ordered to be entered upon the minutes of the Bar Association, and of the several courts, and a copy to be sent to the family of the deceased:

On the 9th day of May, 1897, THOMAS EWING died at his home in the city of Allegheny.

The various positions which Judge EWING has occupied during his life involved great responsibilities and required great industry. The manner in which the duties they involved has been performed commands the highest respect and honor. His life has been passed for many years in the full light of publicity; he has laid down the burdens of his laborious and most useful life at three score years and ten—his integrity as a Judge unquestioned, his uprightness of character undoubted,

his eminent judicial ability fully recognized. His memory is held in respect and honor by every member of the bench and bar of this county.

Judge EWING was born in Washington county, in this State, July 3, 1827, on his father's farm; he was graduated from Jefferson College in the class of 1853; for several years thereafter he devoted himself to the profession of teaching; he prepared himself for the bar in the office of the late Robert Woods, and was admitted to the profession in the year 1856, and continued in practice until his election as President Judge of the District Court, succeeding Judge Hampton in the year 1878. Under the new Constitution he took his seat as the President Judge of Court of Common Pleas No. 2; was re-elected in 1883, without opposition, was again re-elected in 1893, for a third period of ten years. He has therefore served the public in a judicial capacity for nearly a fourth of a century.

His public services also include those of a member of the Constitutional Convention of 1872-1873, as a representative of the Thirty-third Senatorial District of Pennsylvania.

As a member of that Convention, he served on two of the most important of its committees,—that of "Legislation" and that of "Revenue, Taxation and Finance." In all the one hundred and eighty days of the life of that body, he sought but two leaves of absence. He participated in the debates on almost all of the important questions, more especially those which related to municipalities, counties, railroads, banking and taxation. The records of the debates and proceedings of that distinguished body bear most honorable testimony to his zeal, learning and knowledge of public affairs.

It is as a *Judge*, however, that he has built an enduring monument to himself. Weak in body and feeble in health, his constant devotion to his judicial duties stands unsurpassed. To the performance of those duties he brought great learning in the law, profound integrity, strong and acute powers of analysis and reasoning. He was none other ever than himself; self-reliant, courageous in the expression of his opinions, and thoroughly true to his convictions.

In his long judicial career Judge EWING has been called upon to decide many cases of the first impression, involving important and novel questions. His decisions in those cases have added to his rank as a jurist, and the doctrines of them are now accepted principles of law.

It is not within the scope of this minute to record the great questions which he has in his judicial career been called upon to decide; they are in the reports, and they are known to all of us.

He was equally distinguished in the dispensation of law in the Criminal Courts. Firm and decided, he was dignified and prudent in his judgments, and gave careful thought and consideration that justice should not miscarry, or that an innocent man should not unjustly suffer.

His advice and judgment were often sought by those in public office upon questions of official administration; he gave largely of his time to matters involving the administration of public trusts and charities.

Judge EWING was an exemplary member of the Presbyterian Church; a ruling Elder of that body, and has represented his church in its highest courts, with honor and dignity. He was in life a devoted husband and affectionate father, an excellent and public spirited citizen, a highly honored and respected Judge.

By his death the community has lost a faithful public servant, the profession has lost an honored member.

His life, his services, his honesty, integrity and great abilities constitute an enduring monument to his memory.

Eulogistic addresses were made by Hon. M. W. Acheson, Hon. J. W. F. White, Hon. Christopher Magee, Hon. J. W. Over, Hon. John M. Kennedy, T. J. Keenan, Esq., and Hon. Harry White. A letter of regret was read from Hon. George Shiras, Jr.

The meeting also resolved that the courts and the bar should attend the funeral, meeting at the rooms of the Allegheny County Bar Association on the 12th instant, and proceeding thence to the Third Presbyterian Church.

The county officials met in the rooms of the Bar Association at 11 A. M., to pay tribute to the memory of Judge EWING. Law Librarian Percy G. Digby presided. W. W. Murray, county commissioner, and Clerk J. B. Hamilton were elected secretaries. The following minute was offered by Recorder Von Bonnhorst, and read by Secretary Murray, and adopted:

In the death of Honorable THOMAS EWING, President Judge of the Court of Common Pleas No. 2, the people of Allegheny county have suffered the loss of an able, faithful and earnest public official, and although the years of his service as a jurist, during which his fellow-citizens would consider no other man before him, numbered so many that he stood as a venerated Father to the members of the bar, yet his industry and the vigor of his intellect were such that no younger man had greater capacity for work, and there came no visible warning, even to those who were nearest to him, of the final collapse of his vital powers, until the swift and fatal disease struck him down.

During his long career of public service, as in his life as a citizen, he earned and held the utmost confidence and respect of all who knew him.

His busy life closed as he would no doubt have wished it to close, with no lingering away into mental or physical decrepitude, but in the full activity of life, passing, as it were, with one step from the bench, which he had so long adorned, to the grave of rest and peace.

To the people of the county at large, whom he served so long and so faithfully, his death is a great loss, to be greatly deplored; to those of us who enjoyed, some of us for many years, the privilege of close mutual relations by reason of our official positions, it comes as a deep personal bereavement.

In all matters of concern to our official duties, he was as courteous and kindly as he was conscientious; ready with advice, quick with sympathy, ready with assistance, willing at all times to give the help of his clear mind and great learning to any question affecting the public service.

We deplore his death as the loss of a great jurist from the bench, and deeply mourn him as a friend.

Supreme Court, Penn'a.

PACKER v. PACKER.

A paper in the handwriting of a married woman, purporting to be her will, but invalid at the time of its execution for want of witnesses, is not validated by Act June 3, 1887, thereafter passed before her death, dispensing with the requirement of witnesses.

Appeal of William C. Packer, one of the plaintiffs, from the decree of the Court of Common Pleas No. 3, of Allegheny county, in an issue *devisavit vel non*, wherein William C. Packer and Lillie J. Hays were plaintiffs and Sharpley M. Packer, Mary O. Peterson, Olive Sampson and The Safe Deposit and Trust Company of Pittsburgh, guardian of Abram P. Hays and Flora B. Hays, minors, defendants.

For appellant, *William H. Sponsler*.

Contra, Watterson & Reid and H. A. Miller.

Opinion by STERRETT, C. J. Filed January 4, 1897.

This issue *devisavit vel non* between the plaintiffs, claiming as devisees of Electa Packer, who died in October, 1890, and the defendants, heirs at law of said deceased, presents the single question of law, whether a holographic paper, purporting to be the will of a married woman but invalid at the time of its execution for want of witnesses, is validated by the Act of June 3, 1887, dispensing with that requirement. As was correctly said by the learned trial judge, there was no evidence whatever to go to the jury on the question whether the paper was executed in the presence of two witnesses as required by the law, as it was prior to the passage of the Act of 1887, and hence the paper in question had to stand or fall under the provisions of that act.

As recognized by this court, *Mullen v. McKelvey*, 5 Watts, 399, to *Camp v. Stark*, 81* Pa. 235, the rule relating to the proper execution of a will, is that it "must be judged of by the law as it stood at the time of its execution, and not at the time of the death of the testator." It was accordingly held in *Taylor v. Mitchell*, 57 Pa. 209, that a charitable bequest in a will executed by a single witness, prior to the Act of April 28, 1855, was good at the death of the testator after that date, although that act required two subscribing witnesses. Speaking for the court in that case, Mr. Justice SHARSWOOD said: "When a testator makes a will, formally executed according to the requirements of the law existing at the time of its execution, it would unjustly disappoint his right of disposition to apply to it a rule subsequently enacted though before his death. While it is true that everyone is supposed to know the law, the maxim, in fact, is inapplicable to such case; for he would have an equal right to presume that no law would affect his past act, and rest satisfied in security on that presumption. . . . It is true that every will is ambulatory until the death of the testator, and the disposition made by it does not actually take effect until then. General words apply to the property of which the testator dies

possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time."

It was held in *Mullock v. Souder*, 5 W. & S. 198, that sec. 10 of the Act of April 8, 1833, which provides that real estate acquired by a testator after the date of his will shall pass by a general devise, does not apply to a will made prior to its passage. In *Kurtz v. Saylor*, 20 Pa. 205, it was decided that the will of a married woman, invalid for want of authority from her husband, under the wills Act of 1833, was not validated by the Acts of 1848, passed during her lifetime. That case is followed in *Gable's Executors v. Daub*, 40 Pa. 217. In *Camp v. Stark*, 81* Pa. 235, the principle of these cases was applied to the competency of witnesses to a will; and it was there held that a witness incompetent at the execution of a will was not made competent by the enabling Act of 1869. This is now the well settled rule, as to the competency of attesting witnesses, in this country as well as in England: 29 Am. & Eng. Enc. Law, 238.

Applying these principles to the case at bar, it is very evident that the rulings of the learned trial judge were substantially in accordance therewith; and there appears to be nothing in the record that would justify a reversal of the judgment. In *Lane's Appeal*, 57 Conn. 182, substantially the same question was decided, in same way, largely on the authority of *Taylor v. Mitchell*, *supra*; *Lawrence v. Hebbard*, 1 Bradford, 252, and *Hamilton v. Flinn*, 21 Texas, 713, relied on by the plaintiffs, were decided upon the peculiar wording of their statute. Neither of the specifications of error is sustained.

Judgment affirmed.

LINEBERGER v. NEWKIRK.

A release of a life estate to the remainder-man does not create any privity between them. By the release, the life estate is merged in the fee, and the title of the remainder man is not in any sense derived from the life tenant.

In an action of ejectment, therefore, by the remainder-man against one in possession of the property, the record of a former ejectment between the life tenant and the present defendant cannot be put in evidence; the second ejectment is between neither the same parties or privies.

Where the issues in an action of ejectment are upon the genuineness of the signature to a deed, and the sanity of the grantor, they are legal issues to be determined by the jury and not by the court.

In such a case the action is not an equitable ejectment, and is not conclusive against a second ejectment, even between parties and privies.

Appeal of John S. Newkirk and Mary Newkirk, defendants, from the judgment of the

Court of Common Pleas of Mercer county, in an action of ejectment brought by B. C. King, guardian of Caroline Lineberger against said defendants, to recover a certain tract of land in West Middlesex borough, Mercer county.

Upon the trial, before GUNNISON, J., the following facts appeared: Prior to March 23, 1882, John S. Newkirk and Mary Newkirk owned and were in possession of the property in question as tenants in common, on which date, a deed purporting to have been made by them to Ruth Lineberger, was executed, and duly recorded August 1, 1883. Under this deed, the said Ruth Lineberger, with her husband, Lester Lineberger, went into possession of the said property, and subsequent thereto the said Ruth Lineberger died intestate, leaving to survive her her said husband and one daughter, Caroline Lineberger, a minor and the plaintiff in this case, the said husband continuing in the possession as tenant by the curtesy.

In September, 1889, suit in ejectment was brought by John S. Newkirk, one of the defendants above named, against Lester Lineberger, the above named tenant by the curtesy, for the possession of said described land, which was tried at the May term of said court, in 1890. In this case the plaintiff, John S. Newkirk, set forth as his claim to said land that the deed aforesaid, dated March 23, 1882, was not his deed; first, that he never made, signed or executed any such deed, and second, that at the time said deed purports to have been executed, he was insane and absolutely incompetent to execute a deed. In support of these hypotheses, the plaintiff produced to the number of forty witnesses—relatives, friends and neighbors—who knew him well and saw him frequently at the time, prior to and subsequent to the date of the execution, or alleged execution, of said deed. The defendant in said case, to prove the execution of said deed and the sanity of the said John S. Newkirk at the time it was alleged to have been executed, produced the deed and the evidence of twenty witnesses—neighbors and acquaintances of the said plaintiff, John S. Newkirk. The case was submitted to the jury on the charge of the court, in substance, that if the jury found from the evidence that the plaintiff, John S. Newkirk, did not sign the deed in question, the verdict should be in favor of the plaintiff; that if they found that John S. Newkirk did sign said deed, but at the time of so doing the jury should find from the evidence that he was insane, they should also find the amount of improvements made by the defendants upon said land for the purpose of enabling the court to equitably frame the judgment in

the case; that if the jury found from the evidence that John S. Newkirk did execute said deed, and at the time of so doing he was of sufficient mental capacity to make a deed, then the verdict of the jury should be for the defendant. Under this charge of the court the jury found for the plaintiff generally and judgment was entered upon the verdict. A writ of *habere facias possessionem* was subsequently issued and the plaintiff placed in possession of the property involved in the issue.

Some time after John S. Newkirk was placed in possession of the said property, B. G. King was appointed guardian for said Caroline Lineberger and brought this suit on August 31, 1894. On December 21, 1894, Lester Lineberger made a quit claim deed of all his right, title, interest and claim to said property to his daughter, the said Caroline Lineberger, and by an agreement of the parties, by a paper filed in this case, it was agreed that said deed should have the same force and effect in the cause as it would have had if it had been executed and delivered before the commencement of this suit. This case was tried at March Term, 1895. The questions of issue were entirely the same as in the case between John S. Newkirk and Lester Lineberger, to wit: Whether the said John S. Newkirk did sign the said deed, dated March 23, 1882, or whether if he did sign the same he was of sufficient mental capacity to so do. The evidence in the case was substantially the same in kind, character and amount on both sides as in the former case, twenty-four witnesses being examined on the part of the plaintiff and forty-two on the part of the defendants. The defendants offered the record and judgment of the former trial for the purpose of showing that the questions involved in this issue had been therein and thereby conclusively determined. This offer was refused by the court on the grounds and for the reason, that the issue in this case, in the view of the court, was between different parties, and that the record and judgment in the former case were not evidence for any purpose in this case for the same reason.

Verdict for plaintiff and judgment thereon, whereupon the defendants took this appeal, assigning for error, *inter alia*, the refusal to admit in evidence the record and judgment in the ejectment suit between John S. Newkirk and Lester Lineberger.

For appellants, *J. G. White* and *A. B. Thompson*.

Contra, *Q. A. Gordon* and *W. H. Cochran*.

Opinion by GREEN, J. Filed January 4, 1897.

We cannot assent to the proposition that the

plaintiff's title to the land in dispute is derived through her father. She cannot be regarded, therefore, as claiming in privity with him, and hence the rejection of the offer of the record of the first ejectment was entirely correct. Her father's interest was as tenant by the curtesy and in any event, terminated with his life. It was of course terminable at any time by a voluntary surrender to the tenant in reversion and the release executed by him to his daughter was a merger of his life estate with the fee. The proposition that the first action was an equitable ejectment is equally untenable. The issues in the first ejectment were upon the signature of J. S. Newkirk to the deed in question, and the condition of his mind at the time of the signature. These are plain ordinary issues at law. They involve the legal title under the deed and they are properly to be determined by a jury and not by the court. They do not involve equitable considerations or the determination of facts upon which an equitable title arises. As in our opinion it is very clear that the first action was not an equitable ejectment, it would not be conclusive against a second ejectment if it were brought by the defendant in the first, and it could not, possibly, be conclusive against the plaintiff in the present case who was neither a party to the first writ, nor in privity with the defendant therein.

The assignments of error are dismissed.

Judgment affirmed.

DAVIDSON v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO., Lessee.

In an action for personal injury, where the facts are not clear and simple, and where the existence of contributory negligence depends upon inference to be drawn from the evidence, the question must go to the jury.

Plaintiff was riding along a road which crossed at grade two roads parallel with each other, which were about one hundred feet apart. He stopped, looked, listened and waited for a train on the further road to pass and then, as he says, after looking up and down the defendant's road, the one nearest him, he started to cross and was struck by a train coming in the opposite direction from the way the one on the other road was going, which approached without whistling or any other signal. The time required for the defendant's train to reach the crossing after it came within the line of plaintiff's vision was but a fraction of a minute and its approach was deadened by the noise of the receding train. *Held*, that the fact that the plaintiff was hurt by a train which, if his attention had been wholly given in looking in one direction for it, he might have seen, did not of itself render him guilty of contributory negligence, and the case was for the jury.

Appeal of the Lake Shore and Michigan Southern Railway Company, lessee, defendant, from the judgment of the Court of Common

Pleas of Venango county, in an action of trespass by J. C. Davidson to recover damages for injuries done to himself and his daughter, through the alleged negligence of the defendant.

Verdict for the plaintiff for the sum of \$1,443.

The error assigned was, *inter alia*, failure of the court to hold plaintiff guilty of contributory negligence.

For appellant, *McCalmont & Osborne*.

Contra, J. H. Osmer, A. R. Osmer and N. F. Osmer.

Opinion by WILLIAMS, J. Filed January 4, 1897.

This case was before us first in 1895 on the appeal of the plaintiff from a judgment of nonsuit. The question then raised was whether upon the facts disclosed by the evidence the question of the plaintiff's contributory negligence was one of law for the court, or one of fact for the jury. We held it to be one of fact for the jury, and sent the case back for a new trial, in order that the question might be properly submitted to them. It is reported in 171 Pa. 522. Upon the new trial the learned judge submitted this question of contributory negligence, with suitable instructions, and the jury has found against its existence. The defendant is now the appellant, and alleges that the evidence upon the second trial was such as would have justified peremptory instructions in favor of the defendant. We are unable to see that the evidence is in any material respect changed upon the second trial. It shows the position of the dirt road with reference to the river, and the existence of two parallel lines of railroad running near each other between the road and the river and crossed by the road at the place of the accident.

It shows that upon approaching the crossing the plaintiff complied fully with the rule which required him to stop, look and listen before attempting to cross; and that while waiting and listening he heard a train whistle. He then waited for the train to come in sight so that he might know upon which of the lines of railroad it was approaching. It came presently into view and proved to be upon the lower of the railroads. He continued waiting until it should pass, and when it was out of the way he says he looked up and down the defendant's road, which was that nearest to him, and seeing nothing moved on to make the crossing. The noise of the receding train was considerable, so that the approach of a train upon the nearer road might not have been distinguishable. While in the act of crossing he was struck by the de-

fendant, whose train, coming from the opposite direction, approached without signal by whistle or bell, and would have passed over so much of the track as was visible from the crossing in a little less than thirty seconds. The alleged contributory negligence consisted in the fact that the plaintiff was hurt by a train which if his attention had been wholly given to looking in one direction for it, he might have seen. It is not alleged that he failed to stop and look and listen; nor that hearing a signal whistle he failed to wait for the train to approach and pass the crossing. After this was over, he says he looked up and down the defendant's road and seeing nothing and hearing nothing started forward. If this testimony was believed it showed an honest effort to avoid danger. The jury had the right to consider all the circumstances. The day was dark and rainy. The plaintiff waited for a train to pass the crossing which was yet in full view when he started forward. The two railroads were not over one hundred feet from each other. The noise of a passing train upon one of them would naturally drown that of a remoter train upon the other. The time required for the coming train to reach the crossing after it came within the line of vision was but a fraction of a minute. Some attention had necessarily to be given to the management of his horse. The effect of these circumstances and the question whether, in view of them, the plaintiff failed in his duty to the defendant or to himself and was therefore chargeable with contributory negligence that should relieve the defendant from responsibility for the accident was a question of fact to be determined from the testimony and from inferences to be drawn from it. In *Myers v. Baltimore & Ohio Railroad Co.*, 150 Pa. 386, the facts were involved in no doubt. The plaintiff approached a crossing in the night time. The train was moving at a slow rate of speed, backwards, with a headlight on the car nearest to the plaintiff. This headlight was in full view, less than one hundred feet away when he came to the crossing, and lighting up the track at that point and all nearby objects. In the full glare of this light the plaintiff drove upon the track just in front of it. He testified that on approaching the crossing he had stopped his team and looked up and down the railroad and listened, but could neither see nor hear the train whose headlight was upon him, and whose noise could be heard in the stillness of the early morning hour for a long distance. This statement was absolutely incredible; and we said that jurors should not be left to find that to be true which was against the universal experi-

ence of men, and which no one of them could believe if told to him as an individual. When this case was before us in 1895, we endeavored to distinguish the cases in which the existence of contributory negligence has been held to be a question of law from those in which it has been held to be a question of fact, and to show that this case belonged to the latter class. We do not intend to repeat what was then said.

We are not disposed to relax the rule that requires a traveller when approaching a railroad crossing to stop, look and listen; nor to depart from the long roll of cases in which we have held that one who goes in front of a moving train which he has ample opportunity to see, and hear, and avoid, must ordinarily be held guilty of contributory negligence as matter of law; but when the facts are not clear and simple, and where the existence of contributory negligence depends upon inferences to be drawn from the evidence, the question must go to the jury for decision.

The assignments of error are overruled and the judgment is affirmed.

RATHGEBE v. PENNSYLVANIA RAILROAD COMPANY.

It is ordinarily for the jury to decide from the evidence whether the plaintiff has been careful in the use of the way of departure from a railroad station, and whether the defendant company has been negligent in not providing a safe mode of passage to and from said station. The admission of incompetent evidence and the subsequent withdrawal of it before argument, furnishes in itself no ground for continuance or for reversing the judgment.

Appeal of Pennsylvania Railroad Company, defendant, from the judgment of the Court of Common Pleas of Westmoreland county, in an action of trespass brought by Mary Rathgebe to recover for an injury through the alleged negligence of the defendant.

The facts are thus stated in the charge of the court:—

"The plaintiff in this case is Mary Rathgebe and the defendant the Pennsylvania Railroad Company. The plaintiff alleges that she was a patron of this road and that she had purchased a ticket at Irwin Station to ride on the cars of the defendant company to Larimer. This was on the afternoon of January 19, 1893. She alleges that she exercised proper care, under the circumstances; she contends further that the defendant company was negligent in the construction of the platform between the station at Irwin and the tracks of the defendant company and that this was defectively constructed in two particulars, *first*, there was an unusually high step there, from ten to twelve inches, from

the platform down to the track; and *second*, that there was a steep incline that led likewise from the platform to the track, and that on this particular afternoon there was ice or snow and perhaps both, accumulated thereon, and in this case it is alleged further that the defendant company was negligent in permitting the accumulation of ice there, and as the result of this negligence on the part of the defendant company, and while she was exercising ordinary care under the circumstances, she met with the accident which resulted in serious injury, that her arm was broken and she had been permanently disabled; that her earning power was interfered with and that she was put to some expense, and she therefore brings this action to recover compensation in damages for the injuries that she has actually sustained."

The defendant submitted, *inter alia*, points which, with their answers, are subjoined:

4th. "The plaintiff's husband having testified that before plaintiff reached the point on the platform where she fell, he cautioned her to be careful, as the platform was slippery and she having answered that she would be careful, and the evidence being undisputed that the slope or incline was constructed for the purpose of a runway, or track over which to convey the railroad trucks, and provision being made at either end of said runway, and in front of both the ladies' and gentlemen's waiting room for approach to and exit from the trains by step from the upper to the lower platform of about ten inches, and the plaintiff passing over the platform in daylight, several times each year, we instruct you as matter of law it was her duty to adopt the means provided by the defendant company for use of passengers, and having failed to do that she is guilty of contributory negligence, and your verdict must be in favor of the defendant." *Answer*: "We cannot so instruct you, but submit to you to determine whether the plaintiff was guilty of any negligence; if so, your verdict should be for the defendant." (Second assignment of error.)

5th. "Under all the law and the evidence we instruct you to return a verdict in favor of the defendant." *Answer*: "Refused." (Third assignment of error.)

The defendant at the close of the trial, before argument, made the following motion:

"And now, September 17, 1895, after testimony closed, and before argument, attorneys for the defendant move the court strike out the evidence, and withdraw from the consideration of the jury all the testimony of plaintiff and her several witnesses, showing, or tending to show, that the platform and approaches from the sta-

tion to the track of this company were dangerous on and before the date of the accident, and to strike out and withdraw from the consideration of the jury any and all testimony of an expert character given as an opinion that the location was dangerous, and if this order is made, to withdraw the juror and continue the cause."

By the court.—"And now, at the close of the testimony, and before argument of the case to the jury, the testimony of all witnesses, showing, or tending to show, the dangerous condition of the incline of the platform is stricken out and withdrawn from the consideration of the jury. The motion is accordingly granted." (Fourth assignment of error.)

Verdict and judgment for plaintiff. The defendant took this appeal and assigned error, *inter alia*, as above indicated.

For appellant, *Gatther & Woods*.

Contra, *Robbins & Kunkle*.

Opinion by McCOLLUM, J. Filed January 4, 1897.

This action was brought to recover damages for personal injuries alleged to have been received by the plaintiff on the 19th of January, 1898, through the negligence of the defendant. It was conceded on the trial that the plaintiff fell and was injured while walking from the waiting room to the train, but there was a conflict in the evidence as to the place where she fell. The plaintiff claimed that she fell on the slope while the defendant claimed that she fell on the platform between the side track and the Sewickley track. The defendant's claim involved an admission that the plaintiff's fall was caused by the ice on the platform between these tracks, but it did not necessarily convict the defendant of negligence, because it was shown and undisputed that this ice must have been formed from the water which leaked, or was splashed, upon it from the water cars which passed on the Sewickley track but a few minutes before her fall. The evidence submitted by the defendant was mainly directed to this line of defense, and the learned judge of the court below substantially charged the jury that if it was credited by them the plaintiff could not recover.

The plaintiff claimed that the defendant was chargeable with negligence in the construction of the station platform, and in permitting an accumulation of snow and ice upon it. The length of this platform from the west end of the station to the freight platform, and in front of the ticket office and waiting room, was about fifty feet. Along the whole length of it facing the track, it was ten or twelve inches higher than the track platform. For at least three-

fifths of the length of the station platform there was a slope from it to the platform below. The width of the slope was about three feet, and at each end of it there was nine or ten feet of platform, terminating in a ten or twelve inch step. Passengers in going from the waiting rooms to the trains would have to pass over this step, or over the slope. They were not limited by any order or direction of the defendant to either route, but were at liberty to pass over any part of the platform on their way to and from trains.

The evidence showing the construction of the station platform was sufficient to charge the defendant with negligence in this particular, and the evidence in regard to snow and ice upon it warranted an inference that the defendant had negligently permitted them to accumulate there. But the defendant claimed that if the plaintiff slipped and fell on the slope she was not entitled to recover because, in the then existing condition of the platform and its approaches, she was chargeable with contributory negligence in passing over it. The court was requested, but refused, to direct the jury to find for the defendant on this ground. Did the court err in refusing to grant this request? We think not. The question whether the plaintiff was negligent in passing over the slope on her way to the train was under all the evidence in the case for the jury. The instructions in regard to contributory negligence, and the effect of it upon the plaintiff's case, were unobjectionable and clear. The fact that her husband "cautioned her to be careful, as the platform was slippery" and that "she answered that she would be careful" was not a confession of carelessness, or that there was a better route from the waiting room to the train.

A number of witnesses were permitted to testify that the platform and approaches from the station to the tracks were dangerous, but on the request of the defendant's counsel, and before argument, this testimony was stricken out and withdrawn from the consideration of the jury. It is now contended that the court erred in denying the motion of the defendant's counsel to withdraw a juror and continue the cause. The admission of incompetent evidence and the subsequent withdrawal of it before argument furnishes in itself no ground for continuance, or for reversing the judgment: *McGettigan v. Potts*, 149 Pa. 155; *Canal Co. v. Barnes*, 81 Id. 193; *Railroad Co. v. Butler*, 57 Id. 385; *Railroad Co. v. Smith*, 125 Id. 259; *Furniture Co. v. School District*, 158 Id. 85. In the case before us there was no good reason for apprehending or believing that the defendant would be or was prejudiced by the testimony which was with-

drawn before argument, and in regard to which the jury received positive and proper instructions from the court. *Judgment affirmed.*

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

FOSTER v. STRAYER.

The language of the Act of April 20, 1876, P. L. 43, requiring bail absolute for debt and costs, upon appeals from the judgments of magistrates upon claims for wages of manual labor, is broad enough to cover a judgment obtained after the jurisdiction of magistrates was extended to \$300 by the Act of July 7, 1879, P. L. 194.

The said Act of April 20, 1876, is in conflict with the Act of July 7, 1879, extending the jurisdiction of magistrates and conferring upon them concurrent jurisdiction with the Courts of Common Pleas, when the amount in controversy does not exceed \$300, in that it gives the plaintiff an advantage he would not have if the action were brought originally in the Common Pleas.

The said Act of 1876 is class legislation, inasmuch as it gives a special privilege to persons suing before a magistrate for wages of manual labor, and therefore is in violation of Article III, section 7, of the Constitution of 1874.

No. 493 April T., 1897. Rule on defendant to give bail absolute or appeal be quashed.

Opinion by WHITE, J. Filed April 3, 1897.

The transcript of the magistrate states the plaintiff's claim to be \$191.92, balance due "for wages of manual labor as domestic." Judgment for that amount. Defendant appeals, and bail was given "in the sum of \$50, conditioned for the payment of all costs that may accrue or be legally recovered against the appellant." Defendant paid the costs before the magistrate and made the proper affidavit for an appeal.

The rule is to require the defendant to give bail for the debt, as required by section 1 of the Act of April 20, 1876, P. L. 43. This is resisted, because (1) the defendant is poor and unable to give the bail; (2) that act was passed before the act extending the jurisdiction of magistrates to \$300, and is inapplicable to this case; and (3) the act is unconstitutional.

If the defendant is too poor to give the bail required, and for that reason the appeal be stricken off, it might be a denial of justice. But at present we have not the facts before us to decide that question.

The Act of 1876 says, that when the judgment of the magistrate is for "wages of manual labor," before the defendant can appeal, "he shall be required to give good and sufficient bail for the payment of the debt and costs." This language is broad enough to cover a judgment obtained after the jurisdiction was extended to \$300.

The Act extending the jurisdiction was passed July 7, 1879, P. L. 194, and says that magistrates "shall have concurrent jurisdiction with the Courts of Common Pleas" when the amount does not exceed \$300. If the action were brought in the Common Pleas, the plaintiff could not require the defendant to give security for the debt. When the case comes in on appeal, it is heard *de novo*, the same as if the action were originally brought in the Common Pleas. Why should the plaintiff get this advantage by suing before a magistrate? This gives to the magistrate something more than "concurrent" jurisdiction with the Common Pleas; at least, gives the plaintiff an advantage he would not have in the Common Pleas. An appeal from a magistrate's judgment is totally different from an appeal from the judgment of the Common Pleas to the appellate court. When the Act of 1876 was passed, the judgment of the magistrate could not exceed \$100. A defendant might well be able to give bail for \$99, and not be able to give bail for \$299. While the question was limited to claims under \$100, it was not likely to be a great hardship in any case or attract much attention.

This kind of legislation is of a most pernicious character. It is class legislation. If the Legislature can pass such an act in reference to claims for "wages of manual labor," it can pass similar acts in reference to any other class of claims, or it may extend the jurisdiction of magistrates in labor claims to \$1,000, and require bail for the debt in case of appeal. Is not such legislation in violation of Article III., section 7, of the Constitution of 1874? That section says: "The General Assembly shall not pass any local or special law" on the various subjects mentioned, among which is this: "Granting to any corporation, association or individual any special or exclusive privilege or immunity." Does not this Act of 1876 give a "special privilege" to persons suing before a magistrate for "wages of manual labor?" I am strongly inclined to this opinion.

It may not be necessary in this case to decide all these questions now. Perhaps the defendant can and will give bail. We will therefore make the rule absolute, requiring the defendant to give bail for the debt and costs that may be recovered at the trial; bail to be given within twenty days from this date, or satisfy the court that she is unable to give such bail and has a meritorious defense. If necessary at that hearing, we will decide the other questions involved in this case.

For plaintiff and rule, *R. B. Ivory.*
Contra, Shiras & Dickey.

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PITTSBURGH, PA., MAY 26, 1897.

Supreme Court, Penn'a.

DICKSON v. HARTMAN MANUFACTURING COMPANY.

Where the contract of employment, evidenced by letters, does not specify that the employe should be employed for any certain time, testimony of the employe that he accepted the offer on a parol condition that the employment should be for a year is inadmissible to prove such a condition.

Appeal of the Hartman Manufacturing Company, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of *assumpsit* brought by George A. Dickson.

The plaintiff filed a statement in which he claimed that he had been employed by the defendant by a contract contained in the following letter:

"PITTSBURGH, PA., July 30, 1894.

"GEORGE A. DICKSON, Esq., Pittsburgh, Pa.

"Dear Sir:—Referring to our conversation relative to your coming with the Hartman Manufacturing Company, I beg to submit my ideas of the conditions which I think would be satisfactory to the company. You to receive the sum of \$208.34 monthly, and if you fill the position to the satisfaction of the company and remain in its service until July 1, 1895, that you shall receive between July 1 and September 1, 1895, the additional compensation of 3 per cent. of the net profits of the Hartman Manufacturing Company for the year ending July 1, 1895, and 2 per cent. of the net profits of the Ellwood Shafting & Tube Company for the same period. If you should not, from any reason, be retained until July 1, 1895, then you would not be entitled to any share of the profits above referred to.

"It is understood that you would have entire charge of the office and sales departments of both the Hartman Manufacturing Company and the Ellwood Shafting & Tube Company. Your engagement would be with the Hartman Company, but your services would be in the interest of both companies, although no salary would be paid you by the Tube Company, other than the probable contingent above set forth.

"Your official position would probably be that of secretary of the respective companies, and your responsibility as to the management be alone subject to consultation with and approval of the president of said companies.

"Because of our business being altogether new to you, I think the above a fair basis on which to base your engagement. Hoping you will see it in the same light, I remain,

Very truly yours,

"W. H. HARTMAN."

That said plaintiff accepted the proposition upon the conditions stated in said letter, and

the further condition that the plaintiff should have a permanent situation; that otherwise he would not give up his employment with the Oil Well Supply Company, and that the said Hartman then and there agreed that the said plaintiff should have a permanent situation, provided he should give satisfaction; the said plaintiff then entered into the service of said corporation in the capacity above mentioned, and continued in their service to their satisfaction until the first day of November, 1894, when he was discharged without any fault upon his part and without any complaint on the part of either of said corporations.

The defendants claimed to recover eight months salary, and the percentages on estimated profits.

After the jury was sworn, before MCCLUNG, J., the claim as to profit was withdrawn. The plaintiff gave in evidence the letter above quoted and then made the following offers to prove by his own testimony:

That after certain negotiations between himself and the president of the Hartman Manufacturing Company, an agreement was entered into, partly in writing and partly by parol, the letter of July 30, 1894, being that part of the agreement which was in writing, that the plaintiff should be employed by the Hartman Manufacturing Company and the Ellwood Shafting & Tube Company, as sale agent and manager, and that he was to have a permanent situation, that is, not for less time than one year, provided he should give satisfaction, and that if he should remain in the employment of said companies until the first of July, 1895, he was to receive from the Hartman Manufacturing Company a salary at the rate of \$2500 per year, payable monthly, and three per centum of the net profits of the Hartman Manufacturing Company, for the year ending July 1, 1895; and that he did, in pursuance of said agreement, enter into the employment of said company and render satisfaction, and was discharged about the first of November, 1894, without cause or default on his part, and that he was ready and willing to render the service up until the end of the year.

Upon this offer the court ruled as follows:

"The offer seems to go beyond the statement in a material point, that is, it avers an employment for a definite time. The statement simply avers an indefinite employment, that being, in our judgment, the meaning of a permanent situation, as used there. Because the facts offered to be proven are not covered by the declaration we sustain the objection."

The plaintiff then by leave of court amended

his statement so as to make it correspond with the offer, and renewed the offer, which was, under exception to the defendant, admitted. The defendant submitted, *inter alia*, the following point:

"2. The testimony of the plaintiff is insufficient to establish employment for a year or any other agreement than that contained in the letter [the letter above quoted], which was answered as follows:

"This point is refused. He says that the modification was before the acceptance of the letter, and that they came together, and that the letter was merely used as defining some of the terms of the contract, and that the oral contract was different."

Verdict for plaintiff, \$1,734.74 and judgment thereon. The defendant took this appeal, and assigned as error, *inter alia*, the refusal to affirm the above quoted points.

For appellant, *Lyon, McKee & Sanderson.*
Contra, Jennings & Wasson.

Opinion by GREEN, J. Filed January 4, 1897.

The plaintiff's statement basis his claim to recover in this case upon the letter of July 30, 1894, marked "Exhibit A," and annexed to, and made part of, the statement. In stating his contract with the defendant he describes the contents of the letter, and adds, "which agreement was embodied in a letter addressed to said plaintiff by said H. W. Hartman, dated July 31, 1894, a true and correct copy of which is hereto annexed, marked Exhibit A, and made part hereof as fully as though set out at length herein. Second, said plaintiff accepted the proposition upon the conditions stated in the letter marked Exhibit A, and the further condition that the plaintiff should have a permanent situation, . . . and that the said Hartman then and there agreed that the said plaintiff should have a permanent situation provided he should give satisfaction." The plaintiff then avers in the statement that he entered the service of the defendant and continued therein to their satisfaction until the first day of November, 1894, when he was discharged without any fault upon his part, and he claims to recover for eight months salary at \$208.34 per month—\$1,666.72, three per cent. of the estimated profits of the Hartman Co., \$5,400, and 2 per cent. of the estimated profits of the Ellwood Co., \$2,160, making in all \$9,226.72. All of these items are based upon a claim that the plaintiff was entitled to recover upon an entire contract for at least one whole year, and upon the allegation that he was discharged without cause at the end of a few months, leaving eight months of

the year unpaid for. That this statement of claim was founded upon the written letter of July 30, 1894, is not and cannot be disputed. But the letter says nothing about employment for a year, and there is, therefore an added assertion in the statement, that the plaintiff accepted the proposition upon the conditions stated in the letter, and "the further condition that the plaintiff should have a permanent situation." As this was in parol, the plaintiff undertook on the trial to establish this part of his allegation by his own verbal testimony. His offers of proof were rejected chiefly because they only alleged a verbal condition that he should have a permanent situation, and this was too indefinite to support a specific claim for one year, and there was nothing in the plaintiff's statement except a claim that he was to have a permanent situation. Thereupon the plaintiff asked leave to amend his statement by saying that an agreement was entered into "partly in writing, to wit, Exhibit A, attached to plaintiff's statement, and partly by parol, by which the plaintiff was employed by the defendant company for a period of a year at an annual salary of \$2,500, payable in monthly instalments," and the percentage of the net profits of the Hartman Company as previously stated. The amendment was allowed, and then the plaintiff proceeded to testify that he had said to Mr. Hartman that he would be willing "to chance it for a year," and then Hartman said, "If you are willing to chance it for a year all right." While one of the objections was thus removed to the admission of this testimony, it was the least important of all, and does not at all reach the radical objection that it is of what took place a few days, as the witness says, before the letter was written. He says: "The result was that when we came to Pittsburgh I went to our office and then in a few days after that this letter was written." Without making any comments upon the contradiction between the plaintiff's statement of his cause of action, verified by his oath, and his verbal testimony, and the readiness with which he changed his testimony so as to meet the objections of the opposing counsel and the court, it is enough to know that his verbal testimony was most positively and emphatically contradicted and denied by Mr. Hartman, and hence the case presents the ordinary question of the sufficiency of the testimony to alter the contract, where there is the oath of one witness only on one side and the writing and the oath of another witness on the other side. The contention that the contract was partly in writing and partly in parol, does not help the case. The contract was complete

without the parol part, and the plaintiff says it was accepted, and he founds his claim upon its terms. But he seeks to add to it by declaring that he accepted it with an added verbal condition. What is this but the alteration of the instrument? If he made an additional condition, it was his duty to have it incorporated into the writing. Falling in this it was at the very least necessary for him to show that the added condition was omitted from the writing by mistake, fraud or accident. But there is nothing of that kind in the plaintiff's testimony. According to him he accepted the written contract with a verbal addition contradicting it. He did not allege that there was any promise to observe the verbal condition although it was not in the writing, and hence cannot, and does not, now allege, that he accepted the writing upon the faith of such a promise. His testimony is such that it does not bring the case within any of the exceptions to the rule prohibiting parol evidence to contradict written instruments. The writing is complete in itself and therefore may not be contradicted by adding new parol terms to it. What was said by Chief Justice FULLER in *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, is quite in point in this connection, to wit: "Whether the written contract fully expresses the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

In *Naumberg v. Young*, 44 N. J. Law, 31, the following language of the opinion is especially apposite: "If the written contract purports to contain the whole agreement and it is not apparent from the writing itself that anything is left out to be supplied by extrinsic evidence, parol evidence is inadmissible. . . . If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence shall be admitted to introduce a term which does not appear there."

In *Van Voorhis v. Rea Bros.*, 153 Pa. 19, we said: "The several writings offered in evidence by the plaintiff and received without objection, all relate to the same subject and are evidence of successive steps in one transaction; taken together they constitute a contract of bailment. . . . The defendants not denying the writings or alleging fraud, accident or mistake, under-

took to show by one of their number that the contract was something different from that which was written. This they could not do by the uncorroborated testimony of one witness, flatly contradicted as he was by the plaintiff, or even uncontradicted."

In *Wyckoff v. Ferree*, 168 Pa. 261, it was said in the opinion: "A compliance with a request in 1892 was made evidence upon which to base a right in 1893. There had been no omission through fraud, accident or mistake; there was no ambiguity in the language of the contract; there had been established no business usage which threw light upon the intention of the parties, and there was nothing to explain. The alleged parol agreement was at variance with the written contract. It was supported by the testimony of one witness, and denied by that of another. The previous modification, claimed as a corroborating fact, was based upon a request which negated any claim of right and its weight would seem to be with the defendant. We are of opinion that this evidence was not sufficient to sustain a finding by the jury which changed or modified the written agreement between the parties, and binding instructions should have been given as requested." The foregoing decision is in precise analogy with the case at bar. There the defendant, who was engaged in the business of street railway advertising, was authorized by the plaintiff's writing to insert the plaintiff's advertising card in certain cars in a designated space at a fixed price. While the contract was running the plaintiffs desired to withdraw their cards and substitute the cards of other persons in their place, having sublet the space to those persons. This was refused and in an action to recover damages for breach of contract, the plaintiffs claimed that the written agreement was made on the faith of a parol stipulation that a substitution of advertisements of other persons would be allowed. This was testified to by one witness and denied by the defendants. The court below admitted the testimony and a verdict and judgment being entered for the plaintiff, we reverse the judgment without a venire. We held that the evidence of the parol stipulation was not sufficient to sustain a finding by the jury which changed or modified the written agreement. Just so here. The plaintiff claims that there was a parol stipulation which was not in the contract, and testified to it himself, and his testimony on that subject was flatly contradicted by the defendant. In these circumstances the written contract cannot be changed by such testimony. The assignments of error are sustained.

Judgment reversed.

COOKSON v. PITTSBURGH & WESTERN RAILWAY COMPANY.

In an action for personal injury for running over plaintiff's decedent at a crossing where it appears that train of the defendant crossed a public road for the purpose of switching cars, and then backed over the crossing again without a brakeman at the rear of train and with no warning except the ringing of a bell at the other end of the train than the one first approaching the crossing, defendant is guilty of negligence.

In such a case, where the accident happens at a railroad crossing, and the question is raised as to whether decedent stopped, looked and listened for the train at the proper place, the opinion of witnesses after describing as near as possible the approaching to the railroad as to the relative advantage or disadvantage of stopping at different places, is admissible where the places can only be described in a general way.

Where there are two places from which a person approaching a grade crossing can stop, look and listen, plaintiff's decedent cannot be charged with negligence if it appear that he stopped at the one further from the crossing, which the testimony shows was the usual and customary place for travellers to stop, though the one nearer the crossing was the better one.

Appeal of the Pittsburgh and Western Railway Company, defendant, from the judgment of the Court of Common Pleas of Butler county, in an action of trespass by Alfred T. Cookson.

Verdict for the plaintiff, \$18.575.

The facts are sufficiently set forth in the opinion of the Supreme Court, *infra*.

The assignments of error discussed by the Supreme Court were to the admission of the opinion of witnesses acquainted with the approaches to the crossing as to whether plaintiff's decedent stopped at the proper place before attempting to cross the track, and that decedent was guilty of negligence in not stopping to listen for the approach of trains at the proper place.

For appellant, *R. P. Scott*.

Contra, *Lev. McQuiston* and *J. C. Vanderlin*.

Opinion by MITCHELL, J. Filed January 4, 1897.

The appellant's train was run northward and after detaching three cars onto a siding by a flying switch, was continued over and beyond the public road, and then backed over the crossing again with no brakeman at the rear, and no warning except the ringing of the bell at the other end, even this being disputed. Under such circumstances the appellant's negligence, though not formally conceded, did not admit of serious contention.

The public road had a down grade towards the track, and plaintiff's decedent stopped at a point about one hundred and seventy-five feet from the crossing. Here she waited some minutes until the three cars were switched off, and the train had proceeded north over the crossing. She then drove on and was struck by the train

as it reached the crossing the second time, running backwards.

The first three assignments of error are to the admission of the opinions of witnesses that the place where the deceased stopped to look and listen, was the best or at least a proper place. The subject of the admissibility of a witness' opinion was considered in *Graham v. Pennsylvania Co.*, 139 Pa. 149, and the rule there settled that where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. But whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men without special knowledge or training, opinions of witnesses, expert or other, are not admissible. This rule was followed in *McNerney v. Reading*, 150 Pa. 611, and *Dooner v. Canal Co.*, 184 Id. 17. As already said, the distance at which the deceased stopped was considerable, but evidence was given on the part of plaintiff that this point was on the rise of the hill, and that the view was obstructed more and more in descending to the track, by a stone wall on the right, and by buildings on the left, and particularly on this occasion by one of the cars just switched off by this train, which stopped before it got entirely across the road. There was another place where perhaps a better view of the tracks could be had, but it was so close as to be dangerous in case the horses should become frightened. As the relative advantages and disadvantages of the two places could be described only in a general way, it was a fair case for the witnesses who were familiar with both to supplement their descriptions with their opinions in aid of the jury in reaching a decision.

The main argument of the appellant, however, is that the evidence shows incontrovertibly that the deceased was negligent in not stopping at the second point already referred to, a level space just before reaching the track, and therefore the verdict should have been directed for the defendant. The evidence is uniform that there were but two places where a stop could be profitably made, one at considerable distance and the other very close to the crossing. Each had its advantages and its disadvantages. The deceased chose the remoter point, and there was evidence that in so doing she followed the usual habit of people at that crossing. This evidence of itself prevented the court from deciding it to be negligent *per se*.

The usual and customary place of stopping by people using a road cannot be said as matter of law to be an improper or negligent place. The standard of negligence is what persons of ordinary prudence and carefulness would do under the same circumstances, and a general habit of the public to stop in a certain place, is persuasive evidence that that place is the right one. The further the stopping place is from the track the greater will be the chance of an intervening peril before actual crossing. The duty of the traveller is therefore not only to keep a vigilant and continuous lookout, but to stop if a second place affords any increased facility to discover impending danger, but whether there is any such second place is a question of fact which is for the jury if at all in doubt. On this branch of the present case is closely analogous and governed by *Whitman v. Pennsylvania Railroad Co.*, 156 Pa. 175, and the remarks there made are applicable to the facts here: "If notwithstanding the drawbacks of the place where plaintiff stopped, it still had sufficient advantages over other places to make it the habitual choice of travellers on that road, only a jury can say whether or not it was the best or a proper place to stop, and even if it was, whether considering its disadvantages it was negligence in the plaintiff not to stop a second time on the level before reaching the track." See also *Ely v. Railway Co.*, 158 Pa. 233.

Several of the assignments of error are to the language of the charge. Its tone was certainly not commendable. It lacked judicial calmness, and in parts at least came dangerously near being inflammatory as to damages, in an action of a class that peculiarly imposes on the judge the duty to repress natural sympathy with the injured and the suffering, and to hold the jury firmly down to the consideration of strict rights and responsibilities. Our books are not without cases of reversal for errors of this kind. But the nature of the issue and the evidence and the law applicable to it were correctly set before the jury, and though the tone of the charge was objectionable, we do not think it was so erroneous that we should reverse for that cause alone.

Judgment affirmed.

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

LEWIS et al. v. THE LINDEN STEEL CO.

When personal property is sold to a receiver who is carrying on the business of the company for which he is acting, the persons so selling, who in this case were acquainted with the order of court under which the

receiver was acting, stand on the same footing as other creditors, and cannot recover back the goods sold.

Where receivers' certificates are issued, which by order of court are a lien upon the personal property and earnings of the company, prior to all other claims thereon, and these are taken up by a subsequent receiver and other certificates issued in their place under an order of court which does not make them a prior lien to all other claims in payment, the persons so taking them are not entitled to the preference given under the first order of court.

Receivers' certificates issued by an order of court which are not given a priority by the order for other claims are not entitled to a preference over debts contracted by the receiver in carrying on the business under an order of court.

No. 272 April T., 1895. Exception to auditor's report of distribution.

Opinion by WHITE, J. Filed March 24, 1897.

The exception of Naylor & Co., claiming a priority in payment, is not sustained. They sold the Bessemer pig iron to the receiver, to assist in carrying on the business, as other parties furnishing supplies, with direct knowledge that the receiver was conducting the business under the order of court. They sold and delivered the pig iron, parting with their title, and relying upon the receiver for payment. So there was no fraud, deception, or misrepresentation in the purchase, they have no ground on which to claim a return of that portion of the pig metal not used up. They stand on precisely the same footing as other creditors who furnished supplies. This exception dismissed.

The order of court authorizing Mr. Warner to issue certificates expressly made them "a lien upon the personal property and earnings of the Linden Steel Company in possession of the receiver, prior in right to all other claims thereon and shall be first payable thereout."

The order of court authorizing Mr. Wells to issue receiver's certificates to the extent of \$70,000 omits this as to the lien and priority. The auditor says the order to Mr. Wells was "slightly different" from the order to Mr. Warner. I think it was radically different, in a most important particular. The court might well make the \$30,000 asked for by Mr. Warner, when he first entered upon the receivership, a first lien upon the personal property and earnings, but refuse to give that preference to \$70,000 more, which would make a total of \$100,000. Mr. Wells did not ask for \$70,000 to be used partly in lifting and retiring the \$30,000 issued by Mr. Warner. He might have used it all in contracting new debts. Possibly that consideration may have influenced the court in not making these new certificates a prior lien, and possibly may have thought that with \$70,000 of new certificates there would be no necessity

of incurring other debts. True, the petition of Mr. Wells asked that these new certificates be given a preference, like those issued by Mr. Warner, but as the order of court did not contain that clause, we must conclude that the court refused that part of his petition.

Under the discretionary power given to Mr. Wells, he could use \$30,000 of the new certificates in lifting and retiring the old, and probably acted wisely in doing so. That left \$40,000 for other purposes, of which he issued only \$35,000. But he incurred other debts to the extent of some \$41,000. These other debts, it is admitted, was all for supplies necessary to carry on the business and were contracted by Mr. Wells after he applied to court for power to issue certificates.

The holders of the certificates issued by Mr. Warner had, undoubtedly, a preference to other creditors, as specified in his order of court, and if they had held on to those certificates they would now have a preference. But they voluntarily surrendered those certificates and accepted in lieu of them, certificates issued by Mr. Wells. Before they accepted these new certificates they were bound to look into the order of court to see what power Mr. Wells had. Had they done so, they would have seen that these new certificates had no preference. Not having done so they have no just ground of complaint.

Mr. Wells, as well as Mr. Warner, was authorized to carry on the business of the Linden Steel Company, a large establishment, requiring a large expenditure of money, and almost daily purchase of materials and supplies. The purchase of the necessary materials and supplies was incident to, and impliedly granted, in the authority to carry on the works. The schedule of the other debts, attached to the auditor's report, aggregating \$41,486.86, is composed of sixty-three creditors and most of them of small accounts. There is one for \$8,162, one for \$7,713, one for \$7,600, one for \$3,664, one for \$2,671, one for \$2,400, one for \$1,961, one for \$1,422, one for \$1,081, one for \$728, one for \$595, and all the others for less amounts, most of them indeed under \$100. All of these debts were contracted by the receiver under the authority given to him by the court, and they have as much claim upon the court for protection as the holders of the certificates. The receiver had no power to contract debts, or issue certificates, without authority from the court, and when that authority is given, they stand on the same footing, unless the court expressly places the certificates on higher ground.

If these other creditors had looked into the

order granted to Mr. Wells, as they were bound to do, they would have seen that the certificates, under the order of court, had no priority or preference to their debts. It would, therefore, be manifestly unjust to them to give the certificates a preference.

Perhaps this contention is useless; for the attorney of the receiver said in court, during the argument, that it was the opinion of the receiver he would be able, after disposing of all the personal property, to pay in full the certificates and all these debts.

The exceptions to the auditor's report, giving a preference to the certificates, are sustained, and the matter is referred back to the auditor, to make distribution of the fund, *pro rata*, among the creditors, in accordance with this opinion.

For exceptants, *J. J. Miller, Shiras & Dickey* and *W. S. Miller*.

For receiver, *James R. Sterrett*.

For receiver's certificates, *McGill, Cunningham & Chanler*.

For W. J. Lewis and the Linden Steel Co., *Watson & McCleave*.

Court of Common Pleas, WASHINGTON COUNTY.

In re Account of W. CRAIG LEE, Trustee, etc.

Under the Act of Assembly 14th June, 1836, § 15, the jurisdiction of the Common Pleas over a trustee in a mortgage for benefit of creditors becomes fixed when the trust mortgage is delivered, and such jurisdiction does not become changed by the fact that a new trustee, residing in another county, is chosen by all parties in interest to succeed the original trustee, and a new mortgage is executed and delivered to the new trustee in trust for the same creditors.

In such a case it is immaterial that the court of the county where the trust commenced had never actually exercised any jurisdiction over the original trustee.

No. 829 in Equity. Rule to revoke appointment of auditor and dismiss account of trustee for want of jurisdiction.

Opinion by TAYLOR, J. Filed May 12, 1897.

The sole and only question presented for our determination under the petition and answer, and the several mortgages, which by agreement of counsel the court is to regard as part of the proceedings in the case, is whether or not this court has jurisdiction of the account of W. Craig Lee, as trustee for the creditors of Lee & Marshall, under the Act of Assembly of 14th June, 1836, § 15, P. L. 632, *Purd. Dig.* 2029, pl. 15, which provides that the Court of Common Pleas shall exercise the jurisdiction and powers given by law in regard to certain trusts in the county

in which the trustee shall have resided at the commencement of the trust.

In 1876 Lee & Marshall executed and delivered a mortgage to Thomas Fawcett in trust for the creditors therein specified, upon land in Allegheny county, Pa.; another mortgage to the same trustee upon land and coal in Washington county, Pa., and another mortgage to the same trustee upon lands in Columbiana county, Ohio. In 1879 certain of these many creditors (principally banks in the city of Pittsburgh) agreed with Lee & Marshall and all the other creditors and the trustee that they, the said bank creditors, would accept a conveyance in fee of the Washington county lands and coal in full satisfaction of their respective claims, which was accordingly done, and the Washington county mortgage was thereupon satisfied by the trustee. Under the said agreement all the other creditors, called schedule B creditors (the bank creditors being designated as schedule A creditors), still retained their interests in the Allegheny county and Columbiana county lands under the other two mortgages.

In 1883 Thomas Fawcett, trustee as aforesaid, was relieved from his duties as trustee by all the parties concerned and assigned the Allegheny county and the Columbiana county mortgages to W. Craig Lee, the present trustee, as his successor in the trust, and at the same time a new mortgage was executed by Lee & Marshall by agreement with all the schedule B creditors, continuing the trust in W. Craig Lee, with much fuller powers than were possessed by his predecessor, Thomas Fawcett, and in this new instrument the wives of the mortgagors joined for the purpose of releasing their dower in all the lands embraced in the said mortgages. This is shown by the agreements of the creditors and the new mortgage itself. The evident purpose of the new mortgage in which W. Craig Lee is made trustee, was to facilitate the execution of the trust by enabling the trustee to make individual, private sales and to relieve purchasers of any possible claim of dower, and to place the trust in the hands of one of their own number, the new trustee being a creditor of the said Lee & Marshall.

The trust began in Fawcett in 1876 and continued until 1879, and was to convert the lands into cash for the payment of the creditors of Lee & Marshall. In the appointment of W. Craig Lee, trustee, as the successor in the trust of Thomas Fawcett, by the creditors of Lee & Marshall, all parties designate W. Craig Lee as the successor of Thomas Fawcett in the trust, and the new trustee so designates himself in the receipts for money and releases of liens on

the original mortgage of Lee & Marshall to Fawcett. The trust to W. Craig Lee is for the same purposes as between Lee & Marshall and their creditors as it was to Thomas Fawcett, except the enlarged powers to W. Craig Lee. The purpose was to extend time of payment with power to sell and convey lands and pay the creditors with the proceeds. Without discussing this question further we are of the opinion, from all the facts submitted to us in the papers in the case, that the trust began in Thomas Fawcett, who was, at the time of its creation, a resident of Allegheny county, Pa., and that his resignation and the appointment by Lee & Marshall, with the consent of the same creditors and all parties concerned, of W. Craig Lee as his successor in said trust, was but a continuing of the trust commenced in the trustee Fawcett, who, by reason of his residence at the commencement of the trust, was amenable to the Court of Common Pleas of Allegheny county. The distinctive nature of this trust in Fawcett was not and could not be altered or changed by the mere extension of time or the appointment of a new trustee with simply enlarged powers over Fawcett any more than an ordinary extension of creditors could change the character of the debts due them. The new trustee took upon him the mantle of the same trust which was implanted in Thomas Fawcett, and if by the new instrument he became endowed with the new power to reach out and accomplish more, and more promptly, than could his predecessor, the pathway of his duty to the creditors and to Lee & Marshall was the same,—the conversion of the land into money, the payment therefrom of the creditors and the return of the surplus to Lee & Marshall.

While it is true that no jurisdiction was ever exercised or entertained by the courts of Allegheny county over the said Thomas Fawcett, the jurisdiction of said courts does not appear to have ever been invoked, evidently for the reason that Fawcett resigned with the consent of all concerned, accounting to them, if any, and the present trustee by the same authority succeeded him in the office of trustee for the purposes of the trust in the commencement of it in Fawcett, and this being the case, the courts of Allegheny county have jurisdiction of the account, as such, of his successor, and not the court of Washington county.

We agree with the counsel for respondent that the objection to the jurisdiction of this court is purely a technical one. We cannot see what difference it makes to the petitioner, James L. Marshall, of the firm of Lee & Marshall, the creditors of the trustee, in which of

the forums contended for the trustee files his account and is finally relieved of his trust. Nevertheless, the undisputed facts in the case applied to section 15 of the Act of Assembly of 14th June, 1836, P. L. 632, supports the contention of the petitioner, and as he is a proper party to raise the question of jurisdiction, and has not lost his right to have the same raised and decided on the law and the facts, the rule is made absolute.

Counsel for petitioner cites *Johnson's Appeal*, 103 Pa. 373; *Helfenstein's Estate*, 185 Id. 293; and on the fundamental doctrine that where jurisdiction once becomes vested in a particular court by statute, that jurisdiction can never be changed and is exclusive: *Raymond v. Butterworth*, 139 Mass. 471; *Tapley v. Martin*, 116 Id. 275; *Schukill Co. v. Boyer*, 24 W. N. C. 27. And when jurisdiction has been acquired and one party thereto dies, his representatives may be substituted, and the jurisdiction is not affected by the citizenship of such representative: *Upton v. New Jersey S. R. Co.*, 25 N. J. Eq. 372.

And now, May 12, 1897, this cause came on to be heard on petition and answer and the mortgages and agreements agreed to be submitted by counsel, and was argued by counsel, whereupon, after due consideration thereof, the appointment of the auditor in the Common Pleas Court of Washington county, Pa., is revoked, and the account of the trustee dismissed for want of jurisdiction in this court, at the costs of the respondent.

For petitioner, *William M. Watson*.

For respondent, *John W. Donnan*.

Orphans' Court.

In re Estate of FRANCIS GANNON, Deceased.

The bar of the statute of limitations to a claim against a decedent's estate is not removed by a provision in his will that the executors should pay the claim out of the proceeds of a life insurance policy which was uncollectible.

No. 36 March T., 1897. *Sur audit of executor's account.*

Opinion by OVER, A. J. Filed April 9, 1897.

The statute of limitations is pleaded as a defense to the claim of the exceptant, J. S. Killinger, against this estate, and *prima facie* defeats it. The claimant, to remove the bar of the statute, relies on two letters written to him at the instance of the decedent by his son R. E. Gannon, and also on a provision in decedent's will. In the first letter, dated August 2, 1894, the writer says his father had taken out a life

insurance policy to pay debts his assignee had failed to pay, and assures Mr. Killinger "that your account against my father will be settled; how soon I am unable to say, but at present it is impossible.

In the second, dated August 24, 1894, Gannon writes, "In regard to the old notes you hold against father, I will say that he has a list of them and has turned them over to myself and my brother J. F. Gannon, whom he has appointed administrator in his will, made about one month ago, with instructions to use proceeds of a certain life insurance policy, . . . is to be used for the special purpose of paying off his old debts." The decedent in his will provided as follows: "I direct the executors of this my will to collect and distribute policy No. 4035 in the Commercial Alliance Company of New York, now held by me for the sum of \$5,000, to be paid to my old creditors as per schedule hereto attached." In this schedule the claimant was named with others as a creditor for \$1,487.46; the total being \$5,000. After his father's death Gannon wrote to Killinger notifying him of it, that he was informed the insurance company was insolvent, and said, "Unless we get this money from this company we will not be able to pay off these claims. The company proved to be insolvent, and the policy has not and probably will not be collected. It is well settled that 'when a claim to recover a debt barred by the statute rests on the admission of the indebtedness, the acknowledgment thereof must be unqualified and be consistent with a promise to pay on demand. It must not be accompanied by such other expressions as indicate a willingness to pay at some future time. No implication less than this will toll the statute. The language should be so clear as to preclude hesitation as to the debtor's meaning.'" *Lauson v. McCartney*, 104 Pa. 356; *Kensington Bank v. Patton*, 14 Id. 479. As the letters upon which the exceptant relies do not show a promise or intention to pay this claim on demand, but only an intention to pay at some future time, to wit, after the debtor's death, and then only out of the proceeds of the life policy, they do not remove the bar of the statute. Nor does the provision in the will breathe life into the dead claim. It is a specific bequest of the proceeds of the policy mentioned to the persons named in the schedule; and as it is not included in this account, the policy not being collected, the exceptant has no standing as legatee, nor has he as a creditor to file exceptions, and they are therefore dismissed.

For accountant, *E. P. Douglass*.

For claimant, *Milliken & Craumer*.

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No. 45.

PITTSBURGH, PA., JUNE 2, 1897.

Supreme Court, Penn'a.

STRINGERT v. ROSS TOWNSHIP.

The mere fact that a person who was known to have been driving, is found dead on a township road at a point where the road is in such condition of bad repair that he might, by reason of such condition, have been jolted off his wagon, and in falling have struck some hard substance and been thereby killed, does not give rise to a presumption that his death so occurred, and is, therefore, attributable to the township's negligence.

Appeal of Margaret Stringert, plaintiff, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, refusing to take off a nonsuit entered in an action of trespass in which Ross township in the county of Allegheny was defendant.

This action was brought to recover damages for the death of plaintiff's husband, Joseph Stringert, alleged to have been caused by the negligence of the defendant in the care of a township road.

On the trial, before COLLIER, J., the plaintiff showed the following case:

Joseph Stringert, the deceased, was a basket maker, and was accustomed to bring, twice a week, a wagon load of baskets to Allegheny City for sale. On the morning of November 8, 1890, he started from his home in Ohio township with a load of baskets for the city of Allegheny, passing along, as believed, a highway leading through Bellevue, and from thence to the city of Allegheny. He was compelled, for the purpose of finding a market for the sale of his baskets, to go to the upper part of Allegheny, and there he sold his load of baskets and started to return home. He took the Perrysville Plank Road, and after passing beyond Perrysville a short distance he was found lying dead on the public highway, his neck broken, indicating that he had fallen out of his wagon, to the left-hand side of the wagon. His head was lying toward the wagon and his feet were from the wagon. The lines with which he drove the horse were on the same side of the wagon as his body, indicating that he had dragged the lines out with him when he fell out of the wagon. The wagon was found standing

with both wheels in a deep water-table that had been made by the supervisors, crossing the road leading from the right-hand side of the road going north in an oblique direction. This water-table had been deepened by the action of the wheels of vehicles until it was a depth of some two feet below the ordinary level of the road. For a short distance from the south, or in the direction of Allegheny City, the road descended very quickly toward the place of the accident. The brake bar was drawn tightly. The wagon was practically empty, having in it nothing but two sacks of feed and two kegs of beer. The evidence as to the condition of the road is recited in the opinion of the Supreme Court, *infra*. The court entered a nonsuit, which the court *in banc* refused to take off. The plaintiff took this appeal, assigning as error the refusal to take off the nonsuit.

For appellant, *James Fitzsimmons*.

Contra, *George H. Quaitl*.

Opinion by GREEN, J. Filed January 4, 1897.

In the afternoon of November 8, 1890, the dead body of the plaintiff's husband was found lying in one of the public roads of the defendant township, leading to the city of Allegheny. The body was discovered at about four o'clock P. M.; the day was dry and pleasant. The deceased was riding in a one horse wagon, which had been loaded with willow baskets when he left home in the morning, and which were intended to be and no doubt were disposed of in the city. When found in the afternoon, there was nothing in the wagon but two sacks of feed and two kegs of beer. Upon examination of the dead body, it was discovered that the neck was broken at a point which probably caused instant death, according to the testimony of the attending physician. No person saw the accident, and no witness was examined who gave any testimony whatever as to the facts of the occurrence. This action was brought by the widow to recover damages from the township for the loss of her husband. At the trial, upon the completion of the plaintiff's testimony, the court granted a compulsory nonsuit, upon the ground that there was not sufficient evidence to hold the township liable. The propriety of this action is before us on appeal.

Of course it was necessary for the plaintiff, in order to establish a cause of action, to show not only the death of her husband, but also that his death was occasioned by the negligence of the defendant: 93 Pa. 449; 97 Pa. 70; 102 Pa. 474. As there was no testimony to the facts which resulted in his death, there is a serious practical difficulty in the way of the plaintiff in estab-

lishing her cause of action. There was evidence given as to the condition of the road at the place of the accident, and it was of such a character that a jury might be justified in finding that it was in a condition of bad repair, which was due to the negligence of the defendant. But in order to recover, it must be further shown that the negligence of the defendant in this regard was the producing cause of the death. If, taking all the facts together, a justifiable inference could be drawn that the negligent condition of the road was the cause of the death, there was enough to carry the case to the jury. But the difficulty in the case is, that the plaintiff's contention in this regard, requires a succession of inferences without any actual testimony to support them. The best that can be said in support of the plaintiff's theory is that the deceased may have been travelling at a good rate of speed, that the wagon was driven with some rapidity into the hole or ruts which were proved to be there, that it might have been so much jolted by the sudden fall of the wheels into the hole or ruts that the body of the deceased may have been forcibly thrown from the wagon, and that the body may have so fallen as that the head was foremost and received the shock of the blow, and that in fact the head did strike some hard substance, as the wheel, or the hub, or the ground, with such force as to cause the dislocation of the neck. Now if all these things had been proved by testimony there would have been sufficient evidence to carry the case to the jury because a verdict could then be founded upon proof, and not upon mere inference. But there was no testimony upon any of these subjects, and the question then arises, whether the inference that the death was caused by the negligence of the defendant is the only inference that can be drawn from the facts that are in evidence, if it is not, and other inferences may be drawn from the same facts, then there is nothing for the jury but mere guesses or conjectures, and upon these no verdict can be founded.

Evidence was given which tended to show that at the place of the accident there was a depression in the surface of the road evidently intended to carry surface water from one side of the road to the other. This space was about four feet wide and seven feet long. It was depressed about fifteen inches below the surface of the road. There was some confusion in the testimony as to there being any ruts. Some of the witnesses called the space above referred to, a rut, but another said there were two ruts running lengthwise, in the road and parallel with its direction, and across the water table, and

there was some evidence that these ruts were about fifteen inches in depth. Dr. Linley, one of the witnesses, said nothing about any water table or depressed surface of the road, but described only two longitudinal ruts, one on each side of the road, about twelve or fifteen inches in depth, and said the ground between them was solid. He travelled the road a great deal, by day and night, and said: "Q. And how did you go when you were going along there? "A. I sometimes slipped into the rut, and at other times I would drive to the south side in the mud. Q. And by going to the south side you avoided the rut? A. Yes, sir."

Jacob Pool, one of the two persons who first discovered the body says nothing of any parallel ruts, but speaks only of the water table or depressed portion of the road, and says: "It extended very near clear across the road. It was easy seven feet wide and about four feet long. That is you know four feet the way the road was running, and across the road, seven feet. . . . The hind wheels of this wagon were in that hole." On cross-examination, speaking of this same hole, he was led by the questions put to him to call it a rut. Thus: "Q. The front wheels had got up out of the rut? A. Yes, sir. Q. And the hind wheels were still down in the rut? A. Yes, sir. Q. Did this rut extend all the way across the road? A. Very near. Q. What was it that caused this rut? A. The travel of the wagons running down into the rut wore a hole there. . . . Q. How could you avoid this rut on the road at that place? A. You couldn't avoid it at all; you had to go through it; you had to go through one part of it anyhow."

John Smith, the other of the two persons who were together when the body was found, describes the "hole," as he calls it, just about as Pool did. He also spoke of it as a rut in answering questions on cross-examination, but he described a hole. He was asked, "Q. Then this rut as I understand it began on the upper side of the road, on the right hand side as you were going out, and extended over about seven feet? A. Yes, sir. . . . Q. And what was it that caused this hole in the road? A. I guess it was just a little rut happened there and the wheels kept working down. Q. It was originally then a soft place and the wheels kept gradually working it down? A. A little soft, I guess. Q. The rut or hole you say was dry at this time? A. Yes, sir. . . . Q. The front wheels were clear up out? A. Yes, sir. And the hind wheels were down in the rut when you saw it? A. Yes, sir." Andrew Smith spoke of it as a hole and a rut indiscriminately, but evidently meant a hole. Peter Snyder described

it as a hole, saying, "it was kind of on a slope across the road," and, "it was not quite square across the road. The upper wheel would pull out of the wash just about the time the lower one would go in. Q. You have crossed it as you say? A. Yes, sir, I crossed it about twice a week always, sometimes three or four times, but twice a week always, when I done the marketing. Q. Was there anything there to prevent you from crossing; that is to deter you from crossing,—the appearance of it? A. No, sir; I always got over it pretty good . . . there was a little offset, there was a kind of water table along there, you would have to drive into the water table, and there was a little bank I suppose that high (indicating), that is where the fence stood on, you would have to drive against that bank. Q. Then that bank would be about fifteen or eighteen inches? A. No, sir, it was not over ten inches." Archibald Downey described it as a hole that reached nearly across the road and about fifteen inches below the surface of the road. Chris. Rody described it in the same way, and all the witnesses said it was a much travelled road, that the hole was gradually worn down by the wagons, that the road was almost level for a considerable distance on both sides of it, that it was easily seen at a considerable distance before reaching it. All the witnesses who spoke as to the position of the wagon and horse said the horse was standing still, and was attached to the wagon, and that the front wheels of the wagon were up out of the hole, and the hind wheels were in it, when the dead body was found. The body was lying in the road with the head towards the wheels and feet towards the fence, the head being distant about eighteen or twenty inches from the front wheel. One witness said the brake was on. Pool said, "The road was not to say muddy, and it was not dry on each side of the hole; the hole was a little bit sloppy; there was no water in it; it was kind of soft mud." All of these conditions are not at all unusual on country roads, and accidents resulting from such a situation are of extremely rare occurrence. One witness, Pool, was asked, "Q. Did you notice the sides of the hole, whether there was any indication of the wagon having been moved back and forwards? A. Well, yes. You couldn't tell on the hind wheels, you could on the front wheels though, where the horse was trying to pull out, and he would get out maybe a little piece and then drop back in again. He couldn't make it."

How was the death of the plaintiff's husband caused? Nobody knows. In order to impose liability on the township it must be established

by affirmative testimony that the condition of the road caused his death. If such an inference only could be drawn from the facts in evidence, the jury might be authorized to infer and find that such was the fact. But to justify such a conclusion it must be inferred that the wagon was jolted with sufficient violence to throw the deceased out of the wagon. But no fact is shown sufficient to authorize such an inference. It would be necessary that it should be shown that he was travelling at such speed as might produce such a jolt. There is no such proof however, and there is no alternative but inference without proof. Considered in that light it must be observed that no reasonably prudent person would drive his wagon into such a hole or depression at any rate of speed greater than a walk. If he did he would thereby contribute to the production of a serious jolt, and hence be at fault himself, and this is not to be presumed. The inference therefore is, in the absence of evidence to the contrary, that the deceased drove into the hole on a walk, and if he did this, there could not be a jolt of any force. It is difficult to understand how the theory of a forcible jolt can be reconciled with the inference that the deceased performed his legal duty. And this difficulty is vastly increased by the positive testimony of all the witnesses, that there was constantly a very great amount of travel over this road and through this hole or depression. Dr. Linley travelled it constantly by day and by night, and never had any difficulty at the hole. Several of the other witnesses travelled through it every week, and never met with any accident. Weighing the question then by the affirmative testimony upon this particular subject it must be conceded that the enormous preponderance of evidence, indeed the whole of it, is that the ordinary travel over this part of the road could be, and was, conducted in perfect safety. There is nothing, therefore, to be established by mere inference to the effect that a severe jolt caused the deceased to fall from the wagon. This, however, is only one branch of the subject. John Stringert, son of the plaintiff and her husband, testified that his father had been afflicted with asthma and heart trouble. He was asked, "Q. Wasn't he (the deceased) troubled with asthma? A. Yes, sir. Q. Didn't he have some heart trouble also? A. Well he was troubled with heart trouble, but we hadn't noticed any on him I guess for ten years. Q. How old was he at the time he was killed? A. Sixty-eight as far as I know." It is well known that sudden deaths from heart failure in cases where it was least expected are constantly occurring, and reports of them can

be seen almost any day in the newspapers. Of late years they appear to be more numerous than formerly. In this case the presence of the disease was known, though recent indications were not observed. Now the question is, what produced the fall of the deceased? The best that can be said in favor of the plaintiff's recovery is that it may be inferred that the fall was produced by a severe jolt in going through the hole in the road. But it might also have been caused by a sudden attack of heart disease. It might also have been caused by the deceased falling into a doze and losing his balance, or from a sudden attack of apoplexy, or by his having taken too much stimulating refreshment. Or he might have fallen in an attempt to leave the wagon in order to relieve the horse of his weight in trying to pull the wagon out of the hole, as was testified to by the witness Pool. The witness Smith said the wagon had a seat with two springs under it, and it was raised about a foot above the wagon. From such a position any of the causes named might easily have produced a fall. All the possible causes suggested were quite as probable as the theory of a jolt, and it therefore follows that something more than mere inference must be found to support the plaintiff's claim. There must be some kind of definite facts proved by testimony, in order to justify the finding of a jury that the fall was produced by a jolt resulting from the condition of the road.

In the case of *Huey v. Gahlenbeck*, 121 Pa. 238, we held that one who is injured when lawfully upon the premises of another, but does not show either the direct cause of the injury or that it occurred through the negligence of the defendant, is not entitled to recover damages for the injury. In this case the plaintiff was lawfully in the warehouse of the defendant, and was standing near the well of an elevator. He testified that while he was standing there something came down and struck him causing him to fall down the elevator shaft and be injured. He could not tell what it was that struck him and nothing was found on the premises displaced or out of position. PAXSON, J., delivering the opinion, said, "But the plaintiff alleges, and so testified upon the trial below, that he was injured by something falling upon him. He said 'I saw the elevator when I went into the back part of the place, and when I got near to the elevator something came down and struck me and scraped my face, and I fell down upon my back.' The witness was not able to say what it was that struck him; he did not see anything nor did any other witness notice an article of any kind in the building out of place.

There was no evidence that the boxes and parcels, with which the place was filled, had not been piled up with proper care, or that any of them had fallen down. . . . The mere fact that something fell on the plaintiff's head, without more, is not evidence of negligence on the part of the defendant. He cannot be convicted of negligence and compelled to pay a large sum of money without proof." That case goes farther than is necessary in this. The plaintiff was struck by something according to his own testimony, and in consequence of the striking he fell into the elevator shaft. But because he could not tell what it was that struck him, and nothing was found displaced, we held he could not recover, because there was not sufficient testimony to convict the defendant of negligence which produced the injury. Just so here, but in a greater degree. The plaintiff's husband was killed by a fall from a wagon, but there was no proof as to what produced the fall. The conjecture of a cause is not sufficient, especially when other causes for which the defendant would not be responsible might just as well have produced the fall.

Judgment affirmed.

BERINGER v. LUTZ et al.

In an action against a husband and wife to obtain possession of land which had been sold by plaintiff upon a judgment against the husband, it was alleged by the defendants that part of the land, the title of all of which was in the husband, was held in trust by the husband for his wife, which arose in the following manner: The defendants had taken and occupied for twenty years a farm which the father of the wife had bought for her but put in the name of her husband under the mistaken impression that a married woman could not hold title to real estate. This land, together with other adjoining land belonging to the husband, was sold by them at an advance and the proceeds, with other money which came to the wife from her father's estate, was used to purchase in the name of the husband the land in dispute. *Held*,—

- (1) That if the jury believe these facts they were justified in finding for the defendant;
- (2) That these facts were sufficient, if believed, to overcome the presumption that the property belonged to the husband which arose from the deed being in his name;
- (3) That it made no difference whether the money of the wife was paid at the time the title to the land was taken by her husband or thereafter provided the agreement to advance the purchase money preceded or was contemporaneous with the purchase.

A paper signed by the stenographer of the court below and handed up at the argument in the Supreme Court, expressing in opinion that a certain instruction contained in the certified record had been incorrectly transcribed by him, will not be considered.

Appeal of Henrietta Lutz and Daniel Lutz, her husband, defendants, from the judgment of the Court of Common Pleas of Venango county,

in an action of ejectment brought by George Beringer to obtain possession of a tract of land purchased by him at sheriff's sale.

The facts sufficiently appear in the opinion of the Supreme Court, *infra*.

For appellant, *J. S. Carmichael and R. W. Dunn*.

Contra, T. J. McKean.

Opinion by WILLIAMS, J. Filed January 4, 1897.

The questions raised by the several assignments of error will be readily comprehended after a glance at the facts out of which they grow. The plaintiff is a purchaser at sheriff's sale of a farm sold as the property of Daniel Lutz. This proceeding was instituted by the purchaser for the purpose of obtaining possession. The defendant in the judgment concedes that such title as he had has passed by the sheriff's sale to the purchaser, but alleges that as to about twenty twenty-ninths of the title he held for the use of his wife, Henrietta Lutz, under a trust resulting from the payment of \$2,000 of the purchase money by her upon a parol agreement that she should be an owner in proportion to the purchase money paid by her. To establish this trust it was incumbent on Mrs. Lutz to show by evidence that was clear and satisfactory, first, that she did pay a portion of the purchase money for the farm in controversy, as alleged; second, that it was paid upon an agreement that she was to have the title to the land, or such portion of it as she paid for; and third, that the money so paid belonged to her as her separate estate. Upon the trial of the cause Mrs. Lutz gave evidence tending to prove the payment of \$2,000 of the purchase money, and that it was paid upon the agreement alleged. To show that the money was her own, and received from her father's estate, she proved by the testimony of several witnesses that not long after her marriage her father proposed to advance to her the sum of \$400 in land if she and her husband would move upon the land and improve it. To this they both agreed. Her father had, however, the opinion that because the note of a married woman was not valid as an obligation against her, so neither could she lawfully take a title to land. He proposed therefore to give a deed for the land to her husband, take his note for \$400, the price of the land, and charge the note to her share in his estate by his will. This was done. Lutz and his wife went upon the land, lived upon it for more than twenty years, improved it, and at length sold it with an adjoining piece of land which her husband had purchased, and

divided the money received according to their respective interests, she receiving \$1,400 as her share. This together with the moneys received from her father's estate made up the sum she alleged was paid by her. If believed the testimony of the witnesses by whom these facts were shown was sufficient to justify the jury in finding in favor of Mrs. Lutz. The plaintiff alleged that this testimony was unworthy of credit because it was in apparent contradiction of the written documents, the deed, and note given at the time. The question for the jury was whether these papers were so explained and accounted for by the testimony as to overcome the presumption arising, *prima facie*, upon them, and establish the title of Mrs. Lutz in the thirteen acres conveyed by her father to her husband, but admittedly paid for out of her share in her father's estate. The first assignment of error complains that the learned judge erred in affirming the plaintiff's first point. In this point he was asked to say that if Caleb Pyle, the father of Mrs. Lutz, had passed the title to the thirteen acres to Daniel Lutz in 1865, he could not several years later advance the same land to his daughter so as to impress it with a trust in her favor. As an abstract proposition this might be unobjectionable, but as applicable to the facts of this case the point was misleading. No such question was presented on the evidence. There was no attempt to show any such effort on the part of Caleb Pyle as the point assumed.

The allegation of the defendant was that the conveyance to Lutz and the taking of his note as a memorandum was the method by which Pyle sought to secure the land to his daughter, and charge its value to her to be paid out of her distributive share of his estate. If this was believed it would not matter when the deed was made or the note taken. It was a gift to Mrs. Lutz. The answer of the learned judge to the plaintiff's third point is also clear error. It affirms that a resulting trust can be raised only by payment of purchase money at the time the deed is made. If paid before, or after, the act of delivering the deed by the vendor it is ineffectual. *Nixon's Appeal*, 63 Pa. 279, cited as authority for this doctrine, does not support it. What was then held was that the mere advance of money to a purchaser after the purchase is complete will not raise a resulting trust. There was no pretense that the person who advanced money in that case to the purchaser was to take, or to hold, an interest in the title to the land purchased. It was advanced to the purchaser under a promise that if he would buy the property she "would help him pay for it." "Agreeing to help a person buy a farm

in something entirely different," said Justice SHARSWOOD in that case, "from agreeing to join him in the purchase." The rule as we understand it is that the trust must be impressed on the title when it passes to the alleged trustee. It cannot be engrafted upon it afterwards. It must result from facts then existing which in equity turn the taker of a title into a trustee. In other words the agreement to advance the purchase money or a portion of it and take title to the land or to so much of it as the money advanced shall pay for, must precede or be contemporaneous with the purchase; and money subsequently paid in pursuance of such an agreement, under which the title was obtained, should be considered in determining the interest of him who advanced it: *Gilchrist v. Brown et al.*, 165 Pa. 275. By way of illustration let us suppose that A and B agree with each other to purchase a given piece of real estate. The price asked is \$10,000, payable one-half in hand and one-half at the end of one year. A undertakes to pay the first or advance payment, and B the other, and they agree that the title shall be made to both in common. Subsequently A makes the advance payment and directs the deed to be made to himself. Without knowledge of this fraud B, at the end of the year, pays the remaining \$5,000. Does it admit of doubt that he could call upon A for a conveyance of the equal one-half part of the land to himself? His money was not paid until after the title passed to A, but was paid under an agreement which antedated the conveyance to A, and which made it the duty of A when the title came to him to convey an undivided half to B. The facts which made it a fraud in A to take the whole title without the knowledge of B, existed when the conveyance was made to A and the trust resulted from them, and fastened upon the title the instant it rested in him. In this case the defendant alleged that she furnished the \$100 paid upon the preliminary contract and the \$1,000 paid at the delivery of the deed, upon the express agreement with her husband that she was to have an interest in the title corresponding to the amount of purchase money she should furnish, and that she subsequently furnished \$900 more in pursuance of this agreement. If this was believed, the money was paid in time. There was not a *scintilla* of testimony tending to show that the money paid prior to, and at the delivery of the deed, was paid by Lutz, except as alleged by the defendant. The fifth assignment must also be sustained. The point to which it relates was argumentative, and seems to have been drawn for the purpose of securing from the court an in-

dorsement of the line of argument the plaintiff was about to present to the jury upon the facts and the credibility of the witnesses, and it contained an assumption of the truth of the plaintiff's contention upon questions that were properly for the jury. The sixth and seventh assignments are sustained. The affirmance of these points should have been qualified and the jury told that the presumption arising from the form of the deed from Pyle to Lutz for the thirteen acres and the note for \$400 signed by Lutz, was a presumption *prima facie* only, and capable of being rebutted, and if the testimony given by the defendant's witnesses explaining these instruments and the reason given by old Mr. Pyle for putting them in the form in which they were found is believed, then the presumption is rebutted and thereafter to be left out of the account. The twelfth assignment of error points out a clear mistake in regard to the measure of proof required. According to the official copy of the stenographer's notes of the trial certified to by him, and by the learned judge who tried the case, it appears that the jury was told that under the circumstances enumerated by the learned judge in his charge as those surrounding this case, a party could not complain if held to such a uniform measure of proof as would "secure double protection against the effects of frauds and perjuries to men who have purchased upon the faith of legal titles." A slip of paper signed by the stenographer was handed up at the argument, expressing an opinion that this instruction had been incorrectly transcribed by him. We cannot regard such a paper as of any value. The charge has been examined, and its correctness, as it appears in the official copy of the stenographer sent up with the record, certified to by the judge who delivered it. The record is that to which we look, to which we must look and we know of no reason that would justify us in disregarding it in this case. The slip of paper handed up to us is no part of the record which it attempts feebly to qualify. Such a method of amending the record cannot be encouraged. It may be that the jury reached a correct conclusion upon the questions of fact in this case. Upon that subject we express no opinion. What we undertake to say is that the answers and charge of the learned judge were of a character that might have misled them, and induced a verdict that would not have been rendered if the questions of fact on which the case depended had been distinctly and adequately presented to them as they should have been.

The judgment is reversed and a venire facias de novo awarded.

THOMPSON et ux. v. CITIZENS' TRACTION COMPANY.

In a suit against a railway company for permanent injury to plaintiff's premises caused by raising the grade of a township road and maintaining a track thereon, without the consent of abutting owners, the measure of damages is the consequent depreciation in the value of plaintiff's property.

Appeal of the Citizens' Traction Company from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action of trespass wherein Samuel B. Thompson and Martha J., his wife, in right of said wife, were plaintiffs.

The facts of the case appearing at the trial, before STOWE, P. J., were as follows: The plaintiff was the owner of a lot of ground on a public road known as Freeport Road, in the township of O'Hara, Allegheny county; in the fall of 1890, the defendant constructed a double track of railway on the road in front of the plaintiff's property without the consent of the plaintiffs. In the course of the construction the defendant, under the direction of the supervisor of the highway, filled the road, which had the effect of putting the plaintiff's ground below its former grade.

Evidence was admitted as to the value of the property before and after the filling of the road in front of the lot and as to the effect of the change upon the value of the property. (First, second and third assignments of error.)

The court charged:—

"That brings you down simply to the question of how much the plaintiff has lost. We have got to calculate these things in dollars and cents. Somebody may put near my property a mill that I would not like to have there at all—perhaps I move away by reason of it being there. Yet if that mill will make my property sell for more than it would have sold for if it was not there, I am not injured, in a legal point of view. I may be annoyed, I may be put in such position that possibly I would not care to live there; but that is not what we are to consider in cases of this kind." (Fourth assignment of error.)

And "To bring it up to a level it would have to be filled in. That would involve expense to bring it up to its former condition. Apparently whatever that would cost would be the amount of damage done. And yet that amounts to nothing if, as the property stands and without that being done, it is worth more in the market than if the road had not been fixed as it is. Quite a number of witnesses in their judgment think the property is worth more with the road in the condition it is now than it would have

been if the road had not been raised. Whatever their opinion is worth is for you to consider. Others think differently." (Fifth assignment of error.)

And "We come back to just where we started; is that property worth as much since this work has been done? If it is, then the plaintiff is entitled to recover only nominal damages, six cents. Her legal rights have been trespassed upon, but she has suffered no actual injury. And she is entitled to only nominal damages. If the property is worth less than it was before, and would sell for less, then the difference she is entitled to in her verdict. You will get at that either one way or another. As I have suggested, the whole thing comes back to this one question: Is this property in value worth more or less than it would have been if this work had not been done? If worth more, she is entitled to at least nominal damages. If less, she is entitled to the difference between what it is worth now and what it would have been worth if the work had not been done." (Sixth assignment of error.)

Verdict and judgment for plaintiff. Defendant appealed and filed assignments of error as above indicated.

For appellant, *George C. Wilson* and *William D. Evans*.

Contra, *S. Schoyer, Jr., S. B. Schoyer* and *J. M. Cook*.

Opinion by MCCOLLUM, J. Filed May 3, 1897.

The right of the plaintiffs to compensation for the injury done to their property by the change of grade of the highway in front of it and the construction thereon of the railway is not disputed. The defendant, however, contends that the court adopted a wrong method of ascertaining the compensation they were entitled to receive for the injury thus inflicted. All the specifications of error relate to this contention and the cases cited as sustaining it are *Lentz v. Carnegie*, 145 Pa. 612; *McGittigan v. Potts*, 149 *Id.* 155; and *Eshleman v. Martio Township*, 152 *Id.* 68. The rulings and instructions complained of were to the effect that the depreciation in the value of the property as the result of the change of grade and the construction and maintenance of the railway furnished the measure of compensation. Why the defendant in the light afforded by the testimony in the case complains of this measure is not apparent. The uncontradicted evidence on the part of the plaintiffs was to the effect that the cost of raising the lot and buildings to the level of the railway would exceed the depreciation in the value of the property. Besides, the manner in which the case

was tried makes the judgment in it a bar to any future action by them for damages arising from the location of the railway.

The plaintiffs were justified in regarding the railway as a permanent structure, an additional and continuing servitude on their land within the highway. They could not compel a change of grade or location, nor remove the embankment which interfered with access to their lot and was necessary to the support and operation of the railway. Their only remedy was an action to obtain compensation for the injury inflicted: *Pennsylvania Railroad Co. v. Montgomery Co. Pass. Ry.*, 187 Pa. 62. No good reason appears for holding that the rulings and instructions in regard to the measure of compensation were erroneous. The mere fact that the defendant was not invested with the power or right of eminent domain is not a sufficient warrant for condemning them. It is true that they were in accord with the settled rule for the ascertainment of compensation in a case where a corporation invested with the privilege of taking private property for public use has in the construction or enlargement of its works, taken, injured, or destroyed the property of another. But this rule is not necessarily limited to such cases. It may be applied in a case of permanent injury to real estate when the issue is between private persons. An illustration of this may be found in *Williams v. Fulmer*, 151 Pa. 405. In that case the plaintiff sought to recover from the defendant compensation for an injury to his property by reason of the diversion of the water of a navigable river from its natural channel in front of his land, and it was held that "compensatory damages in such cases would be the depreciation in value of the property, if the injury were permanent, or the cost of removing the obstruction, whichever was the lower amount." In our case the defendant made no answer to the plaintiffs' evidence in relation to the cost of raising the lot and buildings. Its evidence was principally directed to the establishment of its claim that the matters complained of by the plaintiffs were a benefit to and improvement of their property.

The cases cited by the defendant are not analogous to the case at bar. This will sufficiently appear from an examination of them.

The defendant having located and constructed its railway on the public road without the consent of the abutting property owners, is liable to them for an injury done to their property by such location and construction. Its liability is the same as if it had obtained their consent to the construction of the railway on giving bonds to compensate them for such injuries to

their property as its location and construction might inflict. In view of this liability, and the nature of the injury for which the plaintiffs ask compensation, we are not satisfied of error in the rulings and instructions complained of.

Judgment affirmed.

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

MCKAY v. PENNSYLVANIA WATER CO.

A water company which has once exercised its right of eminent domain in the location of pipe lines will be enjoined from laying out over the same lands an entirely new and additional route for supplying itself with water, no matter how convenient or necessary the same may be.

No. 779 Dec. T., 1896. Bill in equity to enjoin defendant from laying additional line of pipe over complainant's land.

Opinion by STOWE, P. J. Filed April 23, 1897.

It seems to be well settled that a railroad company, having exercised its right of eminent domain in the location of its roadbed, cannot take land for another and distinct location, unless the power to do so is given it by the Legislature, either in its charter or by other legislation (2 Grant, 187; 55 Pa. 340; 102 Pa. 325; 9 Paige, 328; 1 Allen, 316; see also as to turnpike companies, 12 Conn. 361), and the principle would seem to be applicable to all other corporations having the right to appropriate private property for corporate purposes. The power once exercised is exhausted. While the defendant company may enlarge its water-pipes to any necessary extent upon the line of its present route, we do not think it has any right or power now to lay out an entirely new route for supplying itself with water, however convenient and necessary the same may appear to be. We must therefore direct an injunction to issue as prayed for till further order of the court, security to be given according to law in \$2,000.

For complainant, *J. M. Shields*.

For defendant, *A. W. Duff*.

—Payment of interest not provided for by the contract, prior to the time of entering the decree, is held, in *Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co.* (Ill.) 35 L. R. A. 167, to be not necessary to a decree for specific performance in favor of a vendee in possession against the vendor, who had refused to perform after he had become able to do so and the vendee had tendered the purchase money.

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Supreme Court, Penn'a.

SLICKER v. SCHUCHERT.

Plaintiff let a contract for the building of a house to a contractor and the defendant become surety for the contractor for the faithful performance of all the agreements in the contract. The contract, among other things, specified that a full release of mechanics' liens should be furnished plaintiff by the contractor, and if any lien or claim existed at the completion of the building plaintiff might retain the amount of it out of the balance due the contractor. The plaintiff sued the defendant, alleging the latter requested plaintiff to forego the requirements of the building contract relative to the release of mechanics' liens and that he pay the contractor, which he did, but that there were a large number of liens against the building which he was compelled to pay. Defendant denied having requested plaintiff to pay the contractor without getting a release of liens, and this question, which involved the question as to whether defendant by his words and conduct had induced plaintiff to forego the requirements of the contract were submitted to the jury with the instruction by the court "that if the defendant did so request the plaintiff, and upon the inducement of that request and because of it he paid out that money without requiring this release of mechanics' liens, this certificate that all materials had been paid for, that then defendant is estopped from setting up this defense." Held not to be error, and that the case was properly submitted to the jury.

Appeal of Lambert Schuchert, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in an action of *assumpsit* brought by Peter Slicker against a surety in a building contract.

On July 1, 1893, William G. Conrad entered into a written contract with Peter Slicker, in Lower St. Clair township, Allegheny county, in accordance with certain plans and specifications drawn up by W. A. J. Burket, an architect. The contract price was \$2,623, to be paid by the owner to the contractor as follows:

Two hundred dollars when the stone walls of the cellar are completed and ready for the joists. The further sum of eight hundred dollars when the building is under roof; and the balance when the entire work is completed and a full release of all mechanics' liens, verified by affidavit, furnished to the said owner. All payments shall be made upon written certificates of the architects to the effect that such payments have become due.

And it further provided as follows:

If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default.

Art. XII. The said contractor shall, on the completion of the said work deliver over to the said owner, the said building, free of all mechanics' liens, or claims of mechanics, sub-contractors, or material-men of any nature whatsoever, against the said premises.

On the first day of July, 1893, by a writing on the back of the original contract Lambert Schuchert became surety for William G. Conrad by the following agreement:

I, Lambert Schuchert, do hereby become security as bail absolute for the faithful performance by the said William G. Conrad of all the covenants and agreements contained in the within agreement.

Witness my hand and seal this first day of July, 1893.

LAMBERT SCHUCHERT. [SEAL]

Signed, sealed and delivered in presence of R. E. Slicker.

The house was erected in pursuance of the contract, and as the work progressed the various installments of the contract price were paid as they became due; but no written certificates of the architect to the effect that such payments had become due were obtained, although the work, upon completion of which the installments were to become due, had in fact been completed.

Plaintiff avers that prior to the payment of the last installment, \$1,623, he notified the surety, who had done the plastering, that the house was completed and the contractor demanding his money, and that he requested the surety to get out a mechanic's lien release, or see that one was gotten; but that the surety requested him to pay the money without the release, and that, acting on this request, he (plaintiff) paid the last installment, partly to the contractor himself and partly on orders given by the contractor.

The defendant, Schuchert, denied having authorized the payment of the money without the release, and further averred that he had expressly requested him not to pay.

After the payment of the balance due, liens were filed against the property, and plaintiff was obliged to pay \$1,256.75 to discharge them, for which amount, with interest, this suit was brought to recover from the surety.

In the trial in the court below plaintiff was permitted to prove the oral request of the surety for plaintiff to pay the last payment without

the release of mechanics' liens, although counsel for defendant objected.

There was no contention raised that the work was not done when the various payments were made.

A motion for a nonsuit, on the ground that the contract being within the statute of frauds could not be altered by an oral agreement, having been refused, defendant introduced evidence to contradict the parol request or waiver set up by plaintiff; and the case went to the jury on the question, whether Schuchert, the defendant, induced or requested Slicker, the plaintiff, to pay the last installment without requiring a mechanic's lien release.

The jury found in favor of plaintiff for the full amount claimed.

For appellant, *Hays & Noble* and *L. B. Cook*.
Contra, *W. L. Monro*.

Opinion by STERRETT, C. J. Filed January 4, 1897.

While the testimony covers a great deal of ground and, in the opinion of learned counsel, appeared to involve a great many legal questions, the case virtually hinged on the question of fact—involving the principle of estoppel—which the learned trial judge submitted to the jury with correct and fully adequate instructions, and which they by their verdict determined in favor of the plaintiff, viz: Did the defendant, Schuchert, by his request, induce the plaintiff to forego the requirements of the building contract, relative to the release of mechanics' liens, etc., and pay to the contractor the retained balance of money not theretofore applied on said contract?

While the testimony relating to this subject was more or less conflicting, it was quite sufficient to not only require its submission to the jury, but also to justify them in finding, as they did, that the facts, of which estoppel was predicated, were as claimed by the plaintiff.

Referring to the provision in the building contract, that the retained balance (about \$1,600) should only be payable when the entire work was completed and a full release of all mechanics' liens, verified by affidavit, furnished to the plaintiff, the learned judge instructed the jury, *inter alia*, substantially as follows: If the plaintiff had insisted on this provision of the contract, as he might have done, and ought to have done, for the protection of the surety, if the matter stood just as it was when the contract was executed,—if he had insisted on that, he would have learned of the existence of these liens, and could have saved himself by paying them out of the retained balance, and thus could

have saved the defendant; so that if that was all,—if you find that to be the fact, then the plaintiff could not recover. But he goes further and says that when the house was finished or practically finished, when he was ready to pay the balance upon being assured that he was safe in doing so, he met Schuchert, and that, upon his own suggestion that he ought to insist upon this provision of the contract, "Schuchert requested him not to do so, but to pay out the money."

He further instructed the jury, "that if Schuchert did so request him, and that upon the inducement of that request, and because of it, he paid out that money without requiring this release of mechanics' liens, this certificate that all material had been paid for, that then Schuchert is estopped to set that up as a defense. . . . It would be grossly unfair to permit Schuchert to mislead him, to go to him and request him to forego a protection which he had under the contract, and then set up the fault of the plaintiff, which was due to his request, as a defense to this contract."

It requires neither argument nor citation of authorities to show that there was no error in thus submitting the case to the jury, or applying the principle of estoppel to the facts impliedly found by them.

There was no error in the court's answer to defendant's points for charge recited in the first eight specifications respectively; nor is there anything in either of said specifications that requires special notice. As abstract legal propositions, some of the points are correct, but they are inapplicable to the controlling facts of the case.

Defendant's objection to the question referred to in the ninth specification was rightly overruled. His offer recited in the next and last specifications was not improperly excluded. Neither of these specifications requires further notice. The case was carefully and correctly tried, and the defendant has no just reason to complain of the result. We are all of opinion that the judgment should not be disturbed.

Judgment affirmed.

ALLISON et al. v. POWERS.

Money received in settlement of an action brought by a widow to recover damages for the death of her husband caused by the negligence of defendant, is distributable to the widow and children of the husband in the proportions they would take the personal property of deceased under the intestate laws of this Commonwealth.

Appeal of Jennie A. Powers from the decree of the Court of Common Pleas No. 1, of Allegheny county, declaring said Jennie A. Powers a trustee of money recovered for death of her

husband, and directing her to pay over to the children of decedent their proportionate share.

The cause was heard on bill, answer and proofs, before SLAGLE, J., who reported the facts to be as follows:

"This bill was filed by plaintiffs, praying that the defendant be declared to be a trustee of a certain fund received by her, and directed to file an account of the money so received. The cause was heard on bill, answer and replication, and testimony taken. Upon the pleadings and evidence, the facts are found as follows:

"1. On August 16, 1899, William J. Powers died from an accident on the line of the Western Pennsylvania Railroad, upon which he was travelling as a passenger.

"2. He left surviving him his widow, Jennie A. Powers, the defendant; and five children, Mary A. and William H., the plaintiffs, and Frank T., Ida M. and Clara M., Mary A. and William H. are children of a former wife, and the others children of the defendant.

"3. At the time of Wm. J. Power's death, Mary A. Powers was over twenty-one years of age, having become of age on January 24, 1888. She was at that time a member of her father's family, and so continued until her marriage on August 19, 1891. She had for some time been engaged as a clerk in a store, receiving wages, a portion of which she gave to her father, and after his death to the defendant.

"4. Wm. H. Powers was at the time of his father's death a minor, having arrived at the age of twenty-one on July 5, 1890. He was also at that time engaged at work, receiving wages, and had been for some time previous. He was also a member of his father's family, and remained with his step-mother until October 2, 1895. He had given his wages to his father during his life and to his step-mother until about June 15, 1890, when he quit work, and says he was unable to get a position.

"5. On November 22, 1889, Jennie A. Powers, the defendant, commenced an action against the Pennsylvania Railroad Company, at No. 701 December Term, 1889, in this court, to recover damages for the death of Wm. J. Powers, which she alleged to have been caused by the negligence of that company. The action was in her own name, but the statement contains a clause as follows: 'That said plaintiff and family, consisting of Wm. H. Powers, Frank T. Powers, Ida M. Powers and Clara M. Powers and Mary A. Powers, wife and children of said William J. Powers, deceased, are deprived of the support as aforesaid, etc.' Whereupon she, the said plaintiff, says that 'by reason of the negligence of the defendant aforesaid she and the

said minor children of said William J. Powers, deceased, have sustained damages to the extent of \$50,000, and are entitled to recover said sum from the defendant; and therefore, in her own behalf and on behalf of her said children, she brings suit.'

"6. On February 10, 1891, the defendant received from the Pennsylvania Railroad Company the sum of \$8,000 in compromise of this claim, and executed a release of all claims and demands of herself and children, which she signed and sealed in her own name and as 'Trustee for William H., Frank T., Ida M., Clara M. and Mary A. Powers, minor children of William J. Powers, deceased.'

"7. Of this amount she paid to her attorneys \$600.

"8. The defendant supported William H. Powers until October 2, 1895, as a member of the family."

On the facts as thus found by him a decree was entered, adjudging Mary A. Powers to be a trustee of the fund received by her, and directing her to file an account.

An account was subsequently filed upon which the court entered the following decree:

"And now, to wit, September 16, 1896, this cause came on to be heard on account filed by the defendant, Jennie A. Powers, and exceptions filed thereto by Mary A. Allison, one of the plaintiffs, after argument of counsel and upon consideration thereof, it is ordered and decreed that the said Jennie A. Powers pay forthwith to the said Mary A. Allison the sum of \$1,195.71, liquidated as follows:

One-fifth of two-thirds of \$7,400, being.....	\$ 986 66
Less 5 per cent. commission.....	49 33

\$ 937 33

Interest thereon from February 12, 1892, to date.....	258 38
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Total.....\$1,195 71

"It is further ordered and decreed that said Jennie A. Powers be and is hereby allowed credit for the several amounts charged in her account against the interest of William J. Powers, as payment in full to him for the same, and the bill be dismissed as to him, and that said Jennie A. Powers pay the costs of this suit."

An appeal was taken from this decree assigning for error the first finding of fact; because the court did not find that Mary A. Allison was working for herself and paying board to her father, and also the entering of the above decree.

For appellant, *Levi Bird Duff* and *James M. Cook*.

Contra, Lewis McMullen.

Opinion by STERRETT, C. J. Filed January 4, 1897.

The facts of this case and the legal conclusions drawn therefrom are so clearly presented in the learned trial judge's statement that extended reference to either is quite unnecessary.

The first and second specifications may be dismissed with the remark that there is no error either in finding the facts recited in the former, or in not finding as complained of in the latter. The court's findings must therefore be accepted as the established facts. The controlling question presented thereby is, whether the money, recovered from the Pennsylvania Railroad Company by the defendant, as widow of William J. Powers, for the death of the latter, may be retained by her for the use of herself and family, or must be distributed among herself and the children of the deceased husband under the intestate laws? This question was rightly resolved in favor of the plaintiffs by holding that they are interested in the money recovered by their step-mother, and that the same is distributable to them respectively in the proportion they would take the personal property of their deceased father under the intestate laws of this Commonwealth. This ruling is in strict accordance with the letter as well as the spirit of the Acts of April 15, 1851, and April 26, 1855, and in harmony with several decisions of this court, among which are *Railroad Co. v. Decker*, 84 Pa. 419; *Borough of South Easton v. Reinhart*, 32 PITTSBURGH LEGAL JOURNAL, 385; *Lehigh Iron Co. v. Rupp*, 100 Pa. 95; *Railroad Co. v. Robinson*, 44 Id. 178; *Schnatz v. Railroad Co.*, 160 Id. 602.

A decree was accordingly entered declaring the defendant a trustee of the fund collected as aforesaid, and directing her to file an account of the same. On the coming in of that account, a final distribution, as to the respective interests of the plaintiffs in the fund, was entered, and thereupon this appeal was taken.

The questions involved in the interlocutory as well as the final decree, have been so ably and satisfactorily discussed and disposed of by the learned trial judge that nothing need be added to what has been said in his opinion sent up with the record. On that opinion the decree is affirmed and the appeal dismissed with costs to be paid by the appellant.

HASSON et al v. KLEE.

In an action of ejectment, where the defendant's evidence is to the effect that the defendant and his predecessors in title had been in exclusive, adverse and continuous possession of the land in dispute for more than twenty-one years, and that the land was assessed in the name of the defendant who had paid for taxes

and street improvements thereon, it is error to refuse to charge that after such possession the law will presume the execution and delivery of the deed to the person through whom defendant claims.

In such a case, where defendant claims adverse possession, he is entitled to the affirmance of a point based on the first section of the Act of April 13, 1859, to the effect that no entry upon the property in dispute by the plaintiff or those under whom he claims, during the period in which the property was in actual possession of the defendant, or those under whom he claims, would arrest the running of the statute of limitations, where such entry was not followed within one year by suit for possession.

Appeal of Benjamin Klee, defendant, from the judgment of the Court of Common Pleas No. 2, of Allegheny county, in an action of ejectment brought by James B. Hasson and W. S. Cook, guardians of Frank N. Cook and Lillie Dale Cook, for two adjoining lots on the west side of Buena Vista street, in the city of Allegheny, each having twenty feet front and extending back one hundred and ten feet.

On the trial the plaintiff offered and rested on a deed from William Robison, Jr., to Jonah R. Hasson and William Duff, dated May 10, 1856; a conveyance from Jonah R. Hasson and wife for one-half thereof, dated December 14, 1892; and a quit-claim deed from the alleged heirs of William Duff, for the other one-half interest, dated January 7, 1893. The last two deeds were accepted and taken by the plaintiff with full knowledge of the claims of the defendant and for the purpose of maintaining this action.

The defendant offered evidence to show that one Edward McQuade had been in possession of, was assessed with, and paid the taxes for, the lots in dispute from 1860 to 1866, with proof of his uninterrupted occupancy from 1857 until 1866, at which time the title of McQuade was conveyed by the sheriff to Greenwald & Kahn, by deed dated January 25, 1866; that Greenwald & Kahn remained in actual possession, paying the taxes and all municipal assessments thereon until 1874, when the firm was dissolved and Kahn took, by deed in severalty, these lots; and that the lots have constantly remained in the possession of Kahn or his vendees until the present time; and that from 1860, beyond which the records of the city of Allegheny were missing, the taxes and municipal assessments had been constantly paid by Edward McQuade and the successors in the title under Edward McQuade, including the defendant, until the time of this ejectment brought. Defendant offered evidence to show that at no time had Hasson & Duff, or James B. Hasson, plaintiff, occupied the property or were assessed for, or paid, taxes, or for any of the municipal improvements, or entered into possession of the property.

The defendant also offered in evidence the purchase money bond of Hasson & Duff, to William Robinson, together with proof that that purchase money bond had been paid by Edward McQuade.

The defendant's case therefore rested upon the presumption of a deed from Hasson & Duff; to McQuade, and continuous and notorious adverse possession of the premises for more than twenty-one years.

By way of rebuttal the plaintiff offered testimony taken under objection, tending to show that in the early 60's the lots in question were known as "Hasson & Duff's lots," and that they had been occupied by Hasson & Duff with cattle, on several occasions, and that in July, 1892, persons claiming an option under the plaintiff, repaired the fence around the lots.

The sur-rebuttal showed that this fence was removed by the defendant, who erected a structure upon the premises, and put a man in possession, which possession was maintained until the action in ejectment was brought.

The plaintiff submitted, *inter alia*, the following points:

"3. That if the jury find that as early as 1860, Edward McQuade was in possession of the two lots of ground in dispute, claiming to own the same, and was assessed and paid taxes thereon from 1860 to 1886, and that said lots were generally known in the community, or reputed to belong to him, the same Edward McQuade, and by him were used for drove yard purposes during that period, and that subsequently, to wit, January 25, 1886, Greenwald and Kahn purchased said lots at sheriff's sale, for the sum of \$2,050, and thereupon entered upon and took possession of said property, and held the same by virtue of said sheriff's deed, and that they and those claiming under them from that time down until the institution of this suit have held peaceably, continued, adverse, and exclusive possession of said lots, were assessed and paid taxes and street improvements thereon, and exercised such other and further acts of ownership as the character of the lots warranted, then after twenty-one years of such possession and exercise of ownership, to wit, after 1881, the law will presume the execution, and delivery of the deed to Edward McQuade for the property, from the last preceding grantee, and supply its omission."

"Answer: This point is refused." "I am not willing to say that without you can supply that omission, without proof of the deed's execution and loss; but the facts stated in the point have all been suggested as proper for your consideration, to determine the other question, viz.,

whether or not there has been adverse possession of these lots for the requisite period of time, to give title by the statute of limitations, and I say in answer to this point, 'This point is refused.' And it is on the ground of the last clause that I refuse it." (Third assignment of error.)

"6. That no entry upon the property in dispute by the plaintiff or those under whom he claims, during the period in which property was in the actual possession of defendant or those under whom he claims, would arrest the running of the statute of limitations where such entry was not followed, within one year, by suit for possession."

Answer: This point is affirmed—that is to say, if they have acquired twenty-one years' adverse possession at any time prior to 1893 it would be a bar to recovery." (Sixth assignment of error.)

For appellant, *S. Schoyer, Jr., J. A. Langfitt and William Kaufman.*

Contra, *J. J. Miller and D. C. Nevin.*

Opinion by MCCOLLUM, J. Filed April 26, 1897.

The court should have affirmed the defendant's third point. It was a correct statement of the presumption arising from the facts recited in it. A possession like that described in the point is in conformity with a deed or conveyance of the land, and inconsistent with title in a party cognizant of it. Hence the presumption of a grant. In *Kingston v. Lesley*, 10 Serg. R. 383, TILGHMAN, C. J., said: "The rational ground for presumption is when the conduct of the party out of possession cannot be accounted for without supposing that the estate has been conveyed to the one who is in possession." In support of the proposition involved in the defendant's point, it is sufficient to refer to the following cases: *Taylor v. Dougherty*, 1 Watts & S. 324; *Orr v. Cunningham*, 4 Id. 294; *Baskin v. Seechrist*, 6 Pa. 154; *Strimpfer v. Roberts*, 18 Id. 283; *Warner v. Henby*, 48 Id. 187. It may be said that the refusal of the point was not prejudicial to the defense. But this is by no means clear. The explanation by the court of its refusal to affirm the point not only expressly denied the existence of the presumption claimed as arising from the facts stated in it, but impliedly denied the sufficiency of the facts to give title by the statute of limitations.

The defendant was entitled to an unqualified affirmance of his sixth point. The point was based on section 1 of the Act of April 13, 1859, P. L. 603, which declares that "no entry upon lands shall arrest the running of the statute of

limitations unless an action of ejectment shall be commenced therefor, within one year thereafter." The point was "that no entry upon the property in dispute by the plaintiff, or those under whom he claims, during the period in which the property was in actual possession of the defendant, or those under whom he claims, would arrest the running of the statute of limitations, where such entry was not followed within one year by suit for possession;" and the answer to it was, "This point is affirmed; that is to say, if they acquired twenty-one years' adverse possession at any time prior to 1893, it would be a bar to recovery." The answer indicates a misapprehension by the court of the meaning of the point, and of the purpose of the Act of 1859. Of course, an entry upon the property by a party whose claim was barred by the statute of limitations would not reinvest him with title thereto. No legislation was needed to establish or enforce this proposition. The Act of 1859, on which the sixth point was based, manifestly relates to an entry during the running of the statute of limitations, and to the proceedings necessary to make such entry arrest, from the date of it, the running of the statute. As the plaintiff's testimony tended to show entries upon the property at different times by the plaintiff, or those under whom he claims, the point was pertinent, and should have been affirmed without any misconstruction or qualification of it.

If the ruling of the court in the rejection of the defendant's evidence as to the general report or rumor of title was an error, it was cured by the subsequent reception of the rejected evidence. The admission of evidence which was subsequently stricken out on the motion of the defendant does not appear to afford any substantial ground for reversing the judgment. The same may be said of the general charge. As we have already seen, the answers to the defendant's third and sixth points were erroneous and misleading, and, as they denied to him the benefit of the instructions he sought and was clearly entitled to, we are constrained to reverse the judgment. We therefore sustain the third and ninth specifications of error.

Judgment reversed and venire facias de novo awarded.

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

FRASER v. ALLEGHENY COUNTY.

Under the Act of March 31, 1860, relating to the payment of expenses incurred in arresting persons who

have escaped into another county, a person duly authorized by requisition papers to apprehend a person in Louisiana is entitled not only to reasonable expenses actually incurred, but also for reasonable expenses for services rendered.

No. 20 June T., 1897. Case stated.

Opinion by SLAGLE, J. Filed May 1, 1897.

The plaintiff was duly authorized to execute a requisition for the capture and return of Charles Duff, who was charged with the commission of a criminal offense in Allegheny county and had escaped to Louisiana. He executed the warrant and brought the prisoner to this county. He presented his bill of expenses, amounting to \$210.45, and this suit was brought to determine his right to recover the same from the county.

His right to recover depends upon the Act of March 31, 1860, § 1, Purd. 545, pl. 1.

This act provides for the arrest of persons who have escaped into another county, and then provides: "That the reasonable expenses of executing such process, when issued on behalf of the Commonwealth, shall be paid out of the funds of the county where issued, and the expenses of removing any person charged with having committed an offense in one county into another county, or of transporting any person charged with having committed any offense in this State from another State into this State for trial."

Under this act, the liability of the county for the payment of all reasonable expenses is clear. The only question that can arise is whether the expenses incurred are reasonable.

It is not disputed that the moneys claimed were actually paid; nor is there any allegation that they were unnecessary or extravagant. The plaintiff is therefore entitled to be reimbursed for actual expenses. But it is suggested that the act does not authorize the payment for services, and that he should not be allowed the sum of \$45 claimed as compensation for services.

We do not think this a reasonable construction of the act. The act requires the county to pay reasonable expenses of transporting. Such transportation necessitates the expenditure of time and labor as well as of money, and surely it cannot be expected that any one would give his time and labor, which is often attended with danger and requires courage and intelligence, for nothing. Nor do we regard \$5 per day for such service unreasonable. We are therefore of opinion that the plaintiff is entitled to receive the amount claimed, and we order that judgment be entered against the defendant in favor of plaintiff for the sum of \$210.45 and costs.

For plaintiff, *Rush Lake*.

Contra, N. S. Williams, county solicitor.

Court of Common Pleas, FAYETTE COUNTY.

MURPHY v. FAYETTE COUNTY.

Under the Act of May 23, 1893, constables are entitled to fifty cents for each person upon whom they serve a subpoena issued by a justice of the peace, and not merely to that sum for each subpoena served.

No. 405 Sept. T., 1896. Case stated.

Opinion by EWING, P. J. (MESTREZAT, J., concurring.) Filed March 1, 1897.

The case stated informs us that since the passage of the Act of May 23, 1893, P. L. 117, the plaintiff was elected and duly qualified as constable in the borough of Uniontown, in said county, and that as such officer he served a subpoena, issued by John N. Dawson, a justice of the peace in said county, upon the three several persons therein named, commanding them to appear before the said justice, as witnesses in a criminal case, in April, 1896; that the defendant county subsequently became legally bound for the costs in said case, and has paid the plaintiff fifty cents for serving said subpoena, and refuses to pay any more, upon the ground that said Act of 1893 fixes his said costs at that sum; and that the plaintiff contends that he is entitled to \$1.50 for his said services, and seeks to recover the balance of \$1 in this action.

It will thus be seen that the amount involved is insignificant, and that the only question for determination is what fee or compensation said Act of 1893 provides for constables for serving subpoenas. And were it not that the construction of said act appears to have occasioned some trouble throughout the State the solution would not seem difficult.

The old Act of April 2, 1868, specified the compensation thus: "Serving subpoena, fifteen cents." The Act of 1893 provides: "For serving subpoena, fifty cents." Under the former act the unquestioned construction and practice throughout the Commonwealth was that a constable was entitled to fifteen cents for each witness upon whom he served a subpoena. The defendant here now contends that under the latter act a constable is only entitled to fifty cents for serving a subpoena, no matter how many such service may be made, provided they are all named in the one subpoena. Why?

If the fee provided by the Act of 1868 was for *each witness subpoenaed*, why is it not also the same under the Act of 1893? The language of the two acts is practically exactly the

same, and there is nothing to indicate any difference.

Is not a subpoena served every time it is read to a witness named therein? But, it is said, that "so far as concerns the officer who has it in charge, a subpoena is served only when it has been served upon all named therein." If that were correct, then the officer would be entitled to no compensation if he happened to overlook or failed to find even one of a number named in the writ, although he served it on all the others. He has failed to serve the subpoena, therefore he shall receive according to that idea, no compensation, because the law only provides compensation "for *serving* subpoena." If that is not true, and the officer is still entitled to his fee, then it must follow that the subpoena *is* served when it has *not* been "served on *all* named therein;" and if served when *one* named therein has been omitted, it would also be served when *more than one* has been omitted, and equally so when all have been omitted *but one*. Hence a subpoena is served every time the officer summons the attendance of a witness named therein.

A subpoena is not a writ, the power of which must be exhausted before it can be pronounced served, but one capable of, and intended for many services; and the Legislature was not ignorant of this, and evidently proposed to fix a fee for such service. Nor does it require the reading into the statute of the words "each person" to effect this construction. It is the construction given universally to the Act of 1868, in which no such words appear, and it is really just the plain, unambiguous and reasonable meaning of the words actually employed, strictly construed.

Besides, it is sometimes necessary to put the same subpoena in the hands of different officers in order to secure service upon all the witnesses. In such cases which officer, if either, would the defendant pay? And how much?

It is admitted by all that the purpose of the Legislature in passing the Act of 1893, was to increase the emoluments of the officers affected thereby. Then why is the effort so persistently made to so construe the act as to effect a reduction? One of the cardinal rules in the construction of a law is to ascertain and effectuate the purpose of the law-making power not to discover and then defeat it. If it is thought that the fees in this act are too high the best way to remedy that is to enforce the law, and thus call attention to that feature. At all events, that is not a matter for the consideration of the courts, but of the Legislature. And the increase made for the service in question is not the greatest.

For instance, the Act of 1868 allowed thirty cents for "executing bail-piece," the Act of 1898 \$1; the former act for "executing writ of possession, etc.," fifty cents, the latter \$2; and the former for "serving precept in landlord and tenant proceedings" twenty-five cents, the latter \$1.

It is true that in some other respects the latter act contains some apparently significant changes in the phraseology from that employed in the old law, but they are in isolated and independent items having no relation to the question under consideration. And even in those instances it is far from certain that the difference is substantial.

Again, as Judge GORDON has pointed out in *Woomer v. Clearfield Co.*, 17 Pa. C. C. R. 665, the Act of 1898 is a literal copy—except the omission of the word "circular" in two instances—of the Act of April 3, 1866, P. L. 94, fixing the fees of constables in the city of Philadelphia, and the practice in Philadelphia under that act is to demand and allow fifty cents, not for each subpoena served, but for each service of a subpoena, that is, for each person served therewith. Surely this practice of over thirty years in a community so justly celebrated for legal learning, is more than merely significant.

And in the portion of said Act of 1868 fixing the fees of sheriffs occurs this provision, viz., "Fee on commitment for any criminal matter, fifty cents;" and this is decided in *Wilhelm v. Fayette Co.*, 168 Pa. 462, "to mean a fee of fifty cents for each person received on commitment, without regard to the fact that they were all committed for the same criminal matter, or the further fact that a separate commitment was not made out for each separately." The words of that provision make a stronger case in support of the defendant's contention than do those regarding the fee "for serving subpoena," for they come nearer to applying the fee directly to the writ rather than to the services performed thereunder.

It is, therefore, our opinion—for Judge MESTREZAT concurs herein—that under said Act of 1898, constables are entitled to fifty cents for each person upon whom they serve a subpoena issued by a justice of the peace, and not merely to that sum for each such subpoena served.

And now, to wit, March 1, 1897, for the reasons given in the foregoing opinion, it is hereby ordered and directed that judgment be entered in the case stated in favor of the plaintiff for \$1 and costs.

For plaintiff, *D. M. Hertzog.*

For defendant, *R. F. Hopwood.*

Orphans' Court.

In re Estate of ROBERT R. CALHOUN, Minor.

A guardian who advances the balance found on settlement of his account, is entitled to subrogation to the remedies of his late ward as against his agent who had wrongfully retained possession of the assets represented by the decree.

No. 75 Jan. T., 1894. *In re* petition of guardian for subrogation, etc.

Opinion by HAWKINS, P. J. Filed May 28, 1897.

When the petition of Dr. Stiley was presented there stood in the way of relief a decree of devastavit which it was his duty to satisfy. It was admitted that he had been technically guilty of this devastavit; but it was insisted that as he had acted in good faith and been the victim of misplaced confidence, execution should go against his agent who had misapplied the assets. Conceding the premises, the conclusion does not necessarily follow. True the ward might have pursued either guardian or his agent or both to satisfaction; but these remedies were for his benefit and at his election. It was enough so far as he was concerned that the guardian was of the most available source of payment; and besides he was officially and primarily liable, and could not for his own benefit subject his *cestui que trust* to the additional risk, delay and expense of the other remedy. Right of subrogation certainly could not exist without prior discharge of the duty of payment; for he who comes into court asking, must first do equity. Realizing the force of this suggestion petitioner has since discharged his duty of payment, subject to the right, if any, of subrogation to the remedy of his late ward. Is he entitled? Subrogation being founded upon the principle of benevolence and equity it is impossible to see upon what ground he can be refused. It has been seen that prior to the payment by the guardian, the ward had a cumulative remedy as against his agent—nay prior to his discharge the guardian himself might have availed himself of the jurisdiction of this court to enforce settlement. It is true now, as it was then, that the agent had misapplied and failed to account for the assets. Just as much now as then she is debtor to the extent of the devastavit. True, the guardian had satisfied the ward's claim; but she was in no sense a party thereto. Her obligation to him was neither in fact nor in law prejudiced thereby. Though payment extinguished the decree as between the immediate parties, it still subsists

in equity for the purposes of justice. Thus it is well settled that a surety who pays a claim is entitled to subrogation as against his principal or co-surety: *Sheldon on Subrogation*, § 203. In *McCormick v. Irwin*, 35 Pa. 111, the doctrine was carried to the extent of holding that a surety had a right to subrogation as against a subsequent surety. So where loss has occurred through failure to make a levy or the default of a deputy, by reason whereof a sheriff is compelled to pay a judgment, he is entitled to the remedies of the judgment creditor or the securities of his deputy: *Sheldon on Subrogation*, § 7. So of an executor who pays claims against his decedent's estate: *Charlton's Appeal*, 88 Pa. 476, or a guardian who makes advances to his wards: *Kelchner v. Forney*, 29 Pa. 47. The doctrine of these cases is applicable wherever payment has been made under a fair and legitimate effort to protect the ascertained interests of the party paying, and when intervening rights are not legally jeopardized or defeated: *Mosier's Appeal*, 56 Pa. 76. Payment in the present case was in the discharge of a duty which jeopardized no intervening rights. The controversy lies solely between the principal and his agent, and nothing has been done to prejudice any rights of the latter. She appeared at the audit with the accounts which she had kept as representing the guardian; it was mainly on the basis of information which she furnished that the fact and amount of the devastavit was ascertained; she has been made a party to the present proceedings, and does not controvert the allegations of the petition. The equity of the guardian to subrogation is plain.

And the jurisdiction of the court to grant relief is equally plain. It is a well settled principle that when the jurisdiction of a court of equity, such as the Orphans' Court, has rightfully attached, it will be made effectual for complete relief: *Shollenberger's Appeal*, 21 Pa. 337. Mrs. Rath came into occupancy of the farm under an order of maintenance and became amenable to the jurisdiction of this court by reason of her wrongful retention of assets to which the jurisdiction of this court had rightfully attached: *Marshall's Estate*, 38 Pa. 285. But the guardian who was primarily liable advanced the claim of his ward in the discharge of his official duty. While, as has been seen, he had been guilty of technical devastavit, he acted in entire good faith; and when in the discharge of his duty he had advanced assets which were in fact in the hands and should have been paid by his agent, the right of subrogation became essential to complete relief. And

especially is this true in view of his official relation. The court is bound to give him every protection consistent with that relation. The trust due his ward has been satisfied; there only remains the obligation growing out of the agent's wrongful retention of the trust funds which were the subject of jurisdiction. The adjustment of the rights of these parties are obviously connected topics of dispute and necessarily involved in the administration of the trust.

The guardian's equity is no less strong than that which, in the cases cited, gave the surety, sheriff, executor and guardian the right of subrogation, and its recognition no less essential to the administration of justice.

For guardian, *J. McF. Carpenter*.

For widow, *Daniel Harrison*.

In re Estate of MARY McAULEY, Deceased.

M. signed a paper not attested by witnesses, as follows: "By request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided between the 'Home of the Friendless' and the 'Home for Protestant Destitute Women.'"

"MARY McAULEY."

The premises referred to had been devised to M. and her sister, who died intestate and without issue, by their brother James. Held, that even if the gift to the charities was avoided by the Act of 24th April, 1855, the paper was sufficient evidence of a valid trust and that the beneficiaries took the proceeds of a sale of the premises.

Held further, that the Orphans' Court had jurisdiction to determine the existence of the trust and enforce its provisions in distribution.

No. 4 March T., 1897. Audit of administrator's account.

Opinion by OVER, A. J. Filed May 17, 1897.

The fund for distribution arises from the sale by the administrator *c. t. a.* of the estate of Mary McAuley, deceased, of certain real estate in pursuance of the directions contained in a holographic paper admitted to probate on the 12th day of January, 1886, as her will, of which the following is a copy:

"By request of my dear brother my house on Duquesne way is to be sold at my death and the proceeds to be divided between the 'Home of the Friendless' and the 'Home for Protestant Destitute Women.' MARY McAULEY."

It was neither dated nor witnessed, and was found folded in an old pocketbook near the bottom of her trunk, and with it were a number of obituary notices of her brother James McAuley, who died on the 9th of January, 1871. It was evidently written and signed some years prior to her death; but as there were no sub-

scribing witnesses to the paper it is contended by the next of kin, first cousins of the decedent, that the gift to the legatees named is avoided by the Act of 26th of April, 1855.

This real estate had been devised by her brother James McAuley, by his will executed November 28, 1870, to his sisters Margaret and Mary. Margaret died a few months after her brother, intestate, leaving as her sole heir, her sister Mary, this decedent. It is claimed by the beneficiaries named in the paper that even if the gift be not valid as a testamentary disposition, that the paper shows that James McAuley devised this real estate to his sisters, upon condition that they would at their death give it to these charitable institutions, and that they are therefore entitled to the fund.

It is a settled principle that if a testator make a devise in terms absolute, but upon a private understanding had with his devisee, whether by the latter's express promise or his assent implied by silence, that he will apply the devised estate to some purpose designated by the testator, a trust arises which a court of equity will enforce unless unlawful in itself: *Lewin on Trusts*, 70; *Wallgrave v. Tebbs*, 2 K. & J. 313; 321; *Tee v. Ferris*, *Id.* 357; *Springett v. Jennings*, *Law Rep.* 10 Eq. 483; 3 *Redfield on Wills*, 485; *Story's Eq. Jur.*, 9th ed. 250; *Hoge v. Hoge*, 1 *Watts*, 183; *Church v. Ruland*, 64 Pa. 432, 442; *Shields v. McAuley*, 37 Fed. Rep. 302.

Such a trust, however, is not valid unless the devisee has knowledge of the testator's intention and assents thereto prior to his death: *Schultz's Appeal*, 80 Pa. 96. The paper seems to be a declaration by Mary McAuley that her brother when he made the devise intended that the devisees should eventually give it to these charitable institutions. But it is contended that it does not show that the devisees had knowledge of this intention or assented to it in his lifetime. There is no evidence that any person other than the testator told Mary McAuley of his intention; and as the counsel who prepared the will, an intimate friend was not aware of it, it is not at all probable that any person but the devisees who lived with him on the devised premises knew of it. We think, then, the paper establishes the fact that James McAuley's intentions were communicated by him to Mary McAuley and assented to by her prior to his death. His will was executed more than one calendar month before his death; but there is no evidence as to when his intentions as to the ultimate disposition of the devise were made known to Mary McAuley. However, as the presumption is in favor of the validity of

the trust (*Shields v. McAuley*, 37 Fed. Rep. 302), the burthen is upon those attacking it to show it was created within the prohibited period. It is not necessary to decide whether the execution of this paper is a sufficient compliance with the Act of 26th of April, 1855, *Purd. Dig.* p. 942, requiring declarations of trust to be in writing; as this trust is one arising from implication or construction of law, which are expressly exempted from the operation of the act.

As to Mary McAuley's interest under the devise of her brother we are clearly of opinion that the paper executed by her shows that she held it under a valid trust for the charitable institutions named in it. As to the interest devised to her sister Margaret, the question is close and doubtful. The knowledge of James McAuley's intentions and assent thereto by Mary would not make the trust valid as to Margaret: 1 *Lewin on Trusts*, 147; *Rowbottom v. Dunnett*, 8 Ch. Div. 430. It must be conceded that the evidence is not sufficient to establish a trust as to her if this were a proceeding against her or her estate to enforce it; but as it is a proceeding against the estate of her sole heir and co-devisee, who has by writing, executed by her, acknowledged the existence of the trust as to the whole of the devise, we think it should be sustained. The questions raised here were passed upon by the United States Circuit and Supreme Courts in *Shields v. McAuley*, 37 Fed. Rep. 302, and *Byers v. McAuley*, 149 U. S. 608, and the trust held to be valid as to the whole of the devise. That this court has jurisdiction to determine the existence of the trust and enforce its provisions in distribution is settled by *Hoffner's Estate*, 161 Pa. 331. It may be also that the gift could be sustained as a valid testamentary disposition of Mary McAuley. The Act of 26th of April, 1855, *Purd. Dig.* 2104, pl. 23, provided, "That any disposition of property within said period *bona fide* made for a valuable consideration shall not be hereby avoided." She was under a legal obligation to make the gift, which would constitute a valuable consideration. It was evidently *bona fide*, and if the proviso includes dispositions by wills not properly attested as well as those made within the prohibited period, the gift would be within the exception to the act.

For accountant, *D. T. Watson*.

For legatees, *Thomas Patterson* and *G. C. Burgwin*.

For next of kin, *Wm. M. Watson* and *D. F. Patterson*.

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No. 47.

PITTSBURGH, PA., JUNE 16, 1897.

Supreme Court, Penn'a.

SPROWLS v. MORRIS TOWNSHIP.

Plaintiff was driving along a public road, which for 1,000 feet ran parallel with and close to a railroad. At the end of 600 feet the road rose and passed over a knoll which at its highest point was about 10 feet above the railroad, the road at this point being narrow. While approaching the knoll plaintiff saw a train about 680 feet the other side of it, coming in the opposite direction, from which he was going, and not being familiar with the road, and thinking he would be safer on top of the knoll, he drove on. The train, which took about thirty-five seconds, from the time he first saw it, to arrive opposite the knoll upon which he had driven, frightened his horse, which threw him over the embankment and under the train. Held, that the case was properly submitted to the jury to determine whether plaintiff exercised the care and caution which a reasonably prudent and cautious man would have exercised in driving upon the knoll.

Appeal of Morris Township, defendant, from the judgment of the Court of Common Pleas of Washington county, in an action of trespass brought by A. H. Sprows to recover damages for injuries suffered through the alleged negligence of the defendant in failing to maintain proper grades at a point where a town street road ran in close and dangerous proximity to a railroad.

On the trial, before McILVAINE, P. J., the facts appeared as follows: The plaintiff was driving over the public road in Morris township, which road ran for over 1,000 feet parallel with, and close to the track of the Washington and Waynesburg Railroad. For about 600 feet of this distance the roads run about level with each other; at the end of the 600 feet the public road rose and passed over a knoll, being at its highest point about ten feet above the railroad and having a steep bank. The plaintiff going towards the knoll saw a railroad train over 680 feet off approaching in the opposite direction from that in which he was going. He was not familiar with the road, and thinking he would be safer on top of the knoll, he drove his horse up. When he got on the knoll the train was passing, and the horse, taking fright, threw him down the knoll and against the train, the wheels of which passed over his foot, rendering amputation necessary.

The defendant submitted the following point:

5. "If the jury find, from the evidence, that the plaintiff stopped his horse on this bank, and remained seated in his buggy while the train approached him, that the condition of the road and bank below was such as would have indicated to a man of ordinary care and prudence, that there was danger of injury if he remained in the buggy, and that if he had alighted from the buggy when he saw the train approaching he would have saved himself from the injury received, but that instead of alighting from the buggy he remained seated until his horse took fright, then the plaintiff was guilty of contributory negligence, and the verdict must be for the defendant." Which was thus answered: "That is affirmed; but we leave it to you, gentlemen, to determine what the conduct of an ordinary careful and prudent man under the surrounding circumstances would have been." (Fifth assignment of error.)

Defendant also asked the court to charge:—

6. "Under all the evidence the verdict must be for the defendant." This was refused. (Sixth assignment of error.)

The court in its general chargesaid, *inter alia*:

["On the morning of September 18, 1896, the plaintiff, who for the last five or six years has been a resident of Elgin, Illinois, left his mother's home in West Finley township in this county, to go to Clarktown. He had been to Ringland's Grove on some previous occasion and knew the road that far, but from that point to Clarktown he was unacquainted with the public roads; he was told that when he got to Ringland's Grove he had only to follow the road down Ten Mile Creek and he would reach the place of his destination; he passed Ringland's Grove and reached H. H. Conger's house about eleven o'clock in the forenoon; at this point he struck the west end of this ten or twelve hundred feet of road which runs parallel to the railroad track; after he passed Conger's house and was on the rise going up toward this knoll he saw the train down the track at a point 150 feet west of the crossing; he went on, reaching the knoll about the same time that the engine of the train reached a point directly opposite to the knoll, he going east, and the train coming west; his horse frightened and attempted to turn, went down over the slope taking the buggy with him; the plaintiff was thrown out and lit at the side of the railroad track, under the baggage car (the train still in motion); part of the baggage car and two other cars that were attached passed over his body as he lay along side of the north rail of the track, and one of the wheels run over his foot and

crushed it, and he was bruised in front and on the right shoulder and breast. The train was stopped, he was taken to Waynesburg, had his foot amputated—all but the heel was cut off.

"Now, gentlemen, you will take the testimony in this case and find the facts. What are the facts touching the condition of this road? Second, what are the facts touching the condition of the plaintiff and the manner in which this accident occurred? I have only referred in a general way to the condition of the road and the manner in which the accident happened, because the witnesses do not agree in all particulars and it is for you, and not the court, to say what the exact facts proven are." (Second assignment of error.)

["Second, as to the plaintiff's conduct. The plaintiff claims that he was unacquainted with the road; that when he first saw the train he saw this knoll a hundred feet or more ahead of him, but that he could not see the public road beyond that point, and being a stranger, did not know what lay beyond, but thought perhaps it might be wider or that it turned off further from the railroad, and in place of getting out he drove on hoping to get to a safe place, and that when he got to the top of the knoll he found the road as it has been described here, and that the train was almost up to the point opposite to him, his horse scared and became unmanageable and went over the bank; he claims from the time he first saw the train he exercised his best judgment in an attempt to pass the train, fully realizing all the while that he was in a dangerous place. The defendant claims that the plaintiff should have gotten out of his buggy, that he had plenty of time to do so, that he voluntarily stopped his horse and remained in the buggy and took the risk." (Third assignment of error.)

Verdict for plaintiff, \$5,700, and judgment thereon. The defendant took this appeal and assigned error, *inter alia*, as above indicated.

For appellant, *R. W. Irwin, M. L. A. & B. E. McCracken and J. Q. McGiffin.*

Contra, Albert S. Sprowls and J. M. Sprowls.

Opinion by GREEN, J. Filed January 4, 1897.

It was testified on the trial, and not disputed, that the train on the railroad was running at the time of the accident at a rate of about fifteen miles an hour. This would require about four minutes to a mile or one minute to a quarter of a mile. According to the plaintiff's testimony the point at which he first saw the approaching train, was as ascertained by subsequent measurement, about 680 feet distant from the train. At the rate of speed at which the train was moving

it would have reached his position in about thirty-five seconds from the time he first saw it. He had that much time only to consider his position and his surroundings, and to determine what it was best for him to do. The road was very narrow, not more than ten feet in width. On one side was a steep, inaccessible bank, and on the other a steep declivity, down a bank fourteen feet on its slope and ten to twelve feet in perpendicular depth. At the foot of the bank was a sunken space or gutter two and a half feet in width, and then the bed of the railroad track, the nearest rail being about four feet from the foot of the bank. The road inclined upward towards the brow or knoll a short distance, beyond which the plaintiff said he could not see the road. What was he to do? It is very evident that he would not have time to turn around, even if there was space enough to do so, and it is impossible to tell whether if he did, he would be in any safer condition than if he continued to face the train. Should he jump from the carriage and endeavor to reach the horse's head? Or should he remain in the carriage and endeavor by keeping the horse in motion facing the train to control his movements so as to get him past the moment of danger? This is the plaintiff's own account of his mental operations at the moment of the crisis: "I looked down and saw the train coming on me; well, the train was coming right direct to me; I couldn't make any estimate of the rate of speed the train was running; I glanced the minute I saw the train, I glanced down at the railroad track and saw I was very close to the railroad, there was no barricade between me and the railroad at that point, simply the bank down to the railroad, and I couldn't see up over this road to see what the condition of the road was on the other side, and I thought the best thing for me to do at this point was to try to make a safe point and get over this knoll, and perhaps I would find the road on the other side of the knoll in better condition than it was on this side; these trees obstructed my view, and the height of the knoll prevented me from seeing over the knoll. Then you kept driving straight on? Well, I was very close to the edge of the road and the road being narrow at that point, and it was a hot day and I had the top of the buggy up, and the road was narrow as I told you, and I took into consideration, first, of giving a leap, springing out of the buggy, but, the train approaching, I didn't feel I had time to jump out of the buggy there and get to my horse in time to hold it; the road being narrow, I was afraid, if I gave a jump there I might go clear over, from the fact of the little room from

where the wheel stood until you come to the bank; and under these conditions I thought it was the best thing to stay in the buggy and try to control my horse and keep him in motion and gain a better position, if there was such, on the other side of the knoll."

This was what the plaintiff thought, in view of the exigencies of the situation, it was the best thing for him to do. Conceding for the moment that he was responsible for the correctness of his judgment in such an emergency, who is to decide the question as to what he ought to do? Certainly not the court. In no aspect was it a question of law for the court, and it would have been the gravest error for the court to have withdrawn the case from the jury as was asked by the defendant's sixth point. Beyond all question it was for the jury solely to determine upon the propriety of the plaintiff's action, and the court left it to the jury in these words: "Now, gentlemen, you will find the facts on this branch of the case, what they are under the testimony; and then determine the question, after you have found the facts, did the plaintiff exercise the care and caution that a reasonably prudent and cautious man would have done, taking into consideration all the surrounding circumstances in which he was called to act?" Is there any error in this? Most assuredly not. It was the exclusive province of the jury to determine this question, and the absolute duty of the court to submit it to them. The learned judge, in a previous part of the charge, had plainly and distinctly instructed the jury that if the plaintiff had done anything which an ordinarily careful and prudent man would not have done, and thereby contributed to his injury, he could not recover, and he fully explained the meaning of contributory negligence, and how the rule on that subject should be applied to the facts of the case. He also affirmed without qualification the defendant's second, third and fourth points, which propounded the subject of contributory negligence in the same manner, and committed the whole question to the jury, as he was requested to do by those points.

There is no other view of the matter which it was possible to take. The contradictions in the testimony, which are far more seeming than real, do not at all affect the question. The plaintiff was entitled to be heard upon his own statement of the facts, although there was conflicting testimony; and had the right to have the jury determine what the actual facts were. Having carefully read the whole of the testimony which the defendant urges as highly contradictory of the plaintiff's testimony, we are

bound to say we do not so regard it in any important sense. Some of it is corroborative and that which is contradictory, is in matters of detail that have no important bearing upon the plaintiff's right of recovery.

Even if there was doubt as to this branch of the case, the plaintiff would still be entitled to the benefit of the rule, that a man who is suddenly placed in a position of danger by the negligent act of another, is not responsible for an error of judgment committed in an attempt to extricate himself, if he incurred another danger without negligence of his own: *Aiken v. Penn'a Railroad Co.*, 130 Pa. 380; *Railroad Co. v. Rohrman*, 13 W. N. C. 258; *Vallo v. U. S. Express Co.*, 147 Pa. 404. In the latter case the doctrine is thus expressed: "When a person has been put in sudden peril by the negligent act of another, and in an instinctive effort to escape from that peril falls upon another peril, it is immaterial whether under different circumstances he might and ought to have seen the latter danger."

The first assignment is entirely without merit and is dismissed.

In the second, third and fourth assignments, complaint is made that the charge was unfair in presenting the plaintiff's side of the case and in omitting to present that of the defendant. After a most careful and painstaking examination of the whole of the testimony with reference to this contention, we are constrained to say that we think it unfounded. The court did not pretend to discuss the testimony in detail or even to state it. The matter of the second assignment is a mere general narrative of the leading prominent facts of the case, for the information of the jury, and we cannot see any departure in it from the manifest facts as testified to by the witnesses on both sides. The matter complained of in the third assignment is only a statement of what the plaintiff claimed, and it also stated the material claim of the defendant, to wit, that the plaintiff should have left the buggy, that he had plenty of time to do so, whereby he remained in the buggy and took the risk of doing so. All of this the court fairly left to the jury. While the court did not present the testimony of the defendant in detail, the same was true as to the testimony of the plaintiff, and we cannot discover any lack of fairness or impartiality towards the defendant in the entire charge. These assignments are not sustained. The fifth assignment is still more trivial. The fifth point of the defendant was affirmed as it stood, which was more than the defendant was entitled to, because it asked a binding instruction without considering the

effect of the plaintiff's act in a sudden emergency, and when the court added the qualification that the jury should determine what would be the conduct of an ordinarily prudent and careful man in view of all the circumstances, they merely repeated what was the undoubted law of the case. The point should not have been affirmed absolutely, because it did not necessarily follow that the plaintiff could not recover although he remained in the buggy. Although he may have committed an error of judgment in doing so, the emergency was too sudden and too extreme in its possible consequence, and the time for deliberation was entirely too short to charge the plaintiff with the consequences of a mistaken judgment. Yet the court did affirm the point with the qualification only, that the plaintiff's conduct in leaving the buggy was such as would have been the act of an ordinarily prudent person. In the abstract this was not erroneous, and the defendant was not entitled to an unqualified affirmance of the point. The questions of negligence on the part of the township and contributory negligence on the part of the plaintiff, were carefully examined, and correctly submitted to the jury, who found in favor of the plaintiff. In our judgment the verdict was entirely warranted by the testimony.

Judgment affirmed.

**COMMONWEALTH ex rel. v. PITTSBURGH
ILLUMINATING COMPANY.**

The Pittsburgh Illuminating Company was chartered on May 8, 1895, for the purpose of furnishing gas for light only in the city of Pittsburgh. The Consolidated Gas Company was chartered for the same purpose on May 19, 1871, obtaining exclusive privileges to furnish light in Pittsburgh, and on February 15, 1895, accepted the provisions of the Constitution and the Corporation Act of 1874, and filed a protest against the then pending charter of the defendant company. *Quo warranto* proceedings were then instituted by the Consolidated Gas Company, and it was stipulated that the decision should be as to whether the defendant is entitled to exercise the franchise of furnishing gas for light only . . . this question to depend on whether prior exclusive franchises vested in the plaintiff company. *Held*, that the exclusive privilege was vested in plaintiff, and that further, the stipulations under which the case was tried was not broad enough to determine the question as to whether the Act of June 24, 1895, passed since the incorporation of both companies, which provides for the annulling of exclusive franchises of gas companies in existence prior to the Act of April 29, 1874, regulating the incorporation of corporations which have since accepted the provisions of said act, was constitutional.

Appeal of the Commonwealth of Pennsylvania *ex rel.* Henry C. McCormick, attorney-general, from the judgment of the Court of Common Pleas of Dauphin county, entered in an action of *quo warranto*.

The facts of the case appearing from the record were as follows: The Consolidated Gas Company was created by Act of Assembly of May 19, 1871, P. L. 1872, page 1809, which provided that the company should be governed by the provisions of the general Act of March 11, 1857, P. L. 77. On February 15, 1895, the Consolidated Gas Company accepted the provisions of the Constitution and the Corporation Act of 1874, and filed a protest against the granting of a then pending application for the charter of the Pittsburgh Illuminating Company, asserting in the protest that the Consolidated Gas Company was entitled by virtue of section 34 of the Act of 1874, to an exclusive right to supply gas light within the city of Pittsburgh.

The case was tried without the intervention of a jury and a stipulation was filed as follows:

"The above case is submitted to the decision of the court to determine upon its merits whether the defendant above named is entitled to lawfully claim and exercise the franchise of furnishing gas for light only to the public in the city of Pittsburgh in the district described in its charter. This question to depend upon whether a prior exclusive franchise vested in the Consolidated Gas Company."

The court entered judgment in favor of the defendant. The petitioner appealed, assigning as error, first, the conclusion of law of the court:

"The conclusion to which this discussion has brought us is that the Consolidated Gas Company is not, and was not on May 8, 1895, when the Pittsburgh Illuminating Company was incorporated, invested with the exclusive privilege of manufacturing gas for light only when in the city of Pittsburgh, and therefore, in accordance with the stipulation filed by the parties, judgment is directed to be entered in favor of the defendant."

And second, that the court erred in not deciding that the Act of Assembly of June 24, 1895, P. L. 266, was unconstitutional and void, because it violated the provisions of Article one of section ten of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

For appellant, *Lyman D. Gilbert, D. T. Watson, John H. Weiss, John P. Elkins*, deputy attorney-general, and *Henry C. McCormick*.

Contra, Knox & Reed and Lyon, McKee & Sanderson.

Opinion by MITCHELL, J. Filed April 12, 1897.

We cannot regard this case as raising in proper form for adjudication, the question of the constitutionality of the Act of June 24, 1895, P. L. 266, involving as it would the construction of

the phrase in section 10 of Article XVI. of the Constitution, that the General Assembly shall have power to revoke or annul any charter of incorporation "in such manner that no injustice shall be done to the corporators."

The learned judge below appears to have thought the question sufficiently raised by the stipulation of the parties that the decision should be upon the merits "whether the defendant is entitled to exercise the franchise of furnishing gas for light only . . . this question to depend upon whether prior exclusive franchises vested in the Consolidated Gas Company." But the words "prior exclusive franchises" must refer in point of time to May 8, 1895, when the defendant's charter was issued and its franchises whatever they were came into existence. It is manifest that this question of priority on May 8 cannot be affected by an act not passed until June 24, and having no retroactive words, even if such words could be effectual for that purpose. The stipulation of the parties therefore is not in terms broad enough to include the question under the Act of 1895, and the appellant expressly declines to have it so enlarged.

The Consolidated Gas Company was incorporated by special Act of May 19, 1871, P. L. 1872, p. 1309, but was to be "organized, managed and governed as provided by the Act of March 11, 1857," P. L. 77, for the incorporation of gas and water companies. By the general corporation Act of 1874, P. L. 75, provision was made for the incorporation of gas companies, and by section 28, corporations theretofore existing for any of the purposes named and covered by the act, upon accepting its provisions were to be "entitled to all of the privileges, immunities, franchises and powers conferred by this act." And by section 34, subsequently amended by the Act of June 2, 1887, P. L. 312, the franchises and privileges were to be exclusive within the district or locality covered by the charter, until certain dividends should be earned and divided among the stockholders. The Consolidated Gas Company in February, 1895, accepted the provisions of the Act of 1874, in the manner prescribed, and letters patent were issued to it accordingly. It would seem clear therefore that on May 8, 1895, the privilege of the Consolidated Gas Company was exclusive, and of this opinion apparently was the learned judge below as he based his judgment altogether on the repealing Act of June 24, 1895. But for reasons already shown, that act cannot control this case; and we must leave its constitutionality to be determined when it comes properly before us.

Judgment reversed, and judgment directed to be entered for the Commonwealth.

MATHEWS v. PEOPLE'S NATURAL GAS CO.

In an oil lease for twenty years, which provides that, if a well is not commenced within three months, the lessee shall thereafter pay a specified monthly sum until work is commenced, a clause declaring that in no case shall the commencing of the well be delayed beyond six months, and that, if no well is begun within that term, the lease shall be forfeited, is for the benefit of the lessor, and, until he elects to enforce it, lessee's liability to pay rent continues.

Leatherman v. Oliver, 151 Pa. 619, followed.

The act of the lessor of oil lands in entering on the premises, and erecting a building in such a location as not to interfere with the future operations of a well the site of which was then marked with a stake, was not an eviction.

An absolute conveyance of oil lands by the lessor, without reserving the lessee's right of entry to drill for oil, is a constructive eviction, which terminates the lessee's liability for rent.

Appeal of the People's Natural Gas Company, defendant, from the judgment of the Court of Common Pleas of Washington county, in an action of *assumpsit* brought by James E. Mathews on an oil and gas case submitted to the court on the case and the facts under the Act of 1874.

At the trial it appeared that the lease contained the following clause: "The said party of the first part to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said purposes and a right of way to and from the place or places of operating."

The other material facts appear by the opinion of the Supreme Court.

The court entered the following decree:

"And now, December 30, 1895, it is ordered, adjudged and decreed, that the defendant company pay to the plaintiff the sum of \$2,394.40, being the aggregate of the monthly payments provided for in the contract sued upon from June 6, 1886, to February 6, 1889, and the interest thereon; and it is further ordered that notice of the filing of this decision be given the parties, or their attorneys of record, as provided by law; and if no exceptions thereto are filed within thirty days after service of such notice, judgment will be entered thereon by the probonotary.

The error assigned, among others, was above decree, quoting it.

For appellant, *J. W. & A. Donnan* and *W. S. Miller*.

Contra, *Braden & Campbell* and *McCrakens & McGiffin*.

Opinion by DEAN, J. Filed January 4, 1897.

The plaintiff, on February 6, 1886, leased to defendant for oil and gas purposes, two vacant

lots of ground in South Strabane township, Washington county, for the term of twenty years. The lots were intended for building purposes, and although separated from each other nine hundred feet, both were in what is known as the Gantz and Gordon oil pools, and producing wells had been drilled in proximity to them. The leases contained these provisions:

"The party of the second part covenants to commence operations on this land for said purpose within *three months* from the execution of this lease, or thereafter pay the party of the first part fifty (50) dollars per month until work is commenced; to be paid *each month* in advance; . . . and, after work is commenced, it is to be prosecuted with due diligence *until completion*. . . .

"It is mutually understood and agreed by both parties hereto, that in no case shall the commencing of a well on the above described land be delayed beyond a period of six months from date of this lease, and if no well is commenced inside of said six months, the penalty to be a forfeiture of this lease, and neither party being held further. And it is further understood and agreed that a well drilled on either of above-described lots will hold the lease on the other lot for the full term of lease."

The first month's rental was paid, but thereafter no further rental was ever paid, nor was demand made until this suit was brought on January 23, 1895, nearly nine years afterwards. About one year after the date of the lease, February 20, 1887, the plaintiff entered on one of the lots and built a house, but the evidence tended to show that at this time a stake had been set by defendant, indicating the site of a future well, and that the building would not have materially interfered with the operation. On the 6th day of February, 1889, however, just three years after the date of lease, plaintiff conveyed by deed one of the lots to John D. Porte, without reservation of any right of defendant as lessee to the oil and gas. The claim by plaintiff was for the fifty dollars per month rental from three months after the execution of the lease up to the commencement of the suit. The defendant alleged the true construction of the writing to be that the monthly rental was payable only from three months after the date of the lease until the expiration of six months, when, if there had been no entry for purposes of drilling, the contract was at an end, and all liability on its part ceased. But if this were not the case, then, under the forfeiture clause, all the rights of defendant in case of non-entry terminated at the expiration of six months, and with its termination all liability for rent ended. It was fur-

ther averred that in any event the entry for building purposes in spring of 1887 was an eviction of the lessee as of that date, and terminated the right of the lessor to demand rent.

The case on the law and facts was submitted to the decision of the court under the Act of 1874. The court concluded on the facts under the authority of *Leatherman v. Oliver*, 151 Pa. 649, and that line of cases, the clauses of forfeiture were for the benefit of the lessor, and that under the evidence he had not asserted his right until the conveyance of the lot to Porte, but that at that date he had by his deed in effect declared the lease at an end. Defendant having paid one month's rent, judgment was entered against him for the monthly rental from June 6, 1886, to February 6, 1889, the latter being the date of the Porte conveyance. From this the defendant appeals, assigning for error the construction of the lease and the refusal to hold that the entry for building purposes had not suspended liability for rent.

We decidedly concur with the learned judge of the court below in his construction of the two clauses of the lease relating to forfeiture. As he clearly shows, *Leatherman v. Oliver*, *supra*, *Jones v. Gas Co.*, 146 Pa. 207, *Phillips v. Vandergrift*, 146 Id. 357, *Ogden v. Hatry*, 145 Id. 640, and other cases effectually settle the law, by holding such clauses of forfeiture are for the benefit of the lessor, and, until he invokes them, the lessee's liability continues. At the argument it was not clear to us that the entry of the lessor for building purposes was not such an unequivocal act, indicating an intention to resume possession of the leased property as terminated his right thereafter to demand rent. But, after full consideration, we are of opinion, under the evidence, that neither party so regarded the act at the time. The defendant had set its stake on the lot at the point where a well could be sunk in the future. The building was so located as not to interfere with development at this point. Nor if defendant had attempted to put down a well upon the lot within twenty years, could plaintiff have successfully maintained that the erection of a building covering only a few square feet had been an assertion of his right of forfeiture? We think therefore the court was right in its rulings on defendant's fourth and fifth points, and the assignment of error raising this question is overruled.

We also think the court was clearly right in holding the Porte conveyance a constructive eviction of defendant from the leased land. There was an absolute conveyance by the lessor of one of the lots; no reservation of the lessee's right of entry to drill for oil and gas. This

clearly ended the liability of lessee for rent, and the court properly computed it only to that date.

All the assignments of error are overruled, and
The judgment is affirmed.

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

MEADE, Trustee, v. ISRAEL & SON.

Issue to try the validity of a judgment. What creditors are entitled to an issue and what is necessary for the petition to set forth. What evidence will be considered sufficient to justify the granting of an issue.

No. 125 Sept. T., 1895. Rule on part of creditors to open confessed judgment.

Opinion by SLAGLE, J. Filed May 15, 1897.

This is an application for an issue to try the validity of a judgment confessed by the firm of L. Israel & Son in favor of plaintiff, in trust for certain creditors as against other creditors.

The note bears date June 25, 1894, for \$6,792, in one day after date, to the order of K. T. Meade, trustee for L. Katten, \$3,300; for H. Israel, \$1,092; for A. Israel, \$2,400. Judgment was entered June 28, 1895, and execution issued the same day. June 29, 1895, the firm of Levi Israel & Son made a voluntary assignment for the benefit of creditors to Jacob Affelder. On July 12, 1895, a petition was presented by a number of creditors, alleging that the judgment confessed to Mr. Meade was fraudulent and void, and asking that the execution be stayed and an issue formed to test the validity of this judgment. To this answers were filed by defendants and parties interested in the judgment. Subsequently an arrangement was made by which the sheriff delivered the property to the assignee, to be sold by him subject to the levy. Nothing further was done in regard to the issue prayed for until July 15, 1896, when, an account having been filed by the assignee, and an auditor appointed to make distribution, a supplemental petition was filed by the same and other creditors, incorporating all that was set out in the original petition and some other facts, and again asking for an issue.

The answer to the original petition raised legal objections to its sufficiency, and also denied the facts upon which it was based. It was not in the form prescribed by the Act of April 20, 1846, *Purd.* 854, pl. 132.

The second or supplemental petition is in strict conformity with the Act of 1845, and states sufficient facts to support the allegation of fraudulent purpose. No answer was filed to this petition, but on the same day an agreement

was filed that evidence in support of the petition should be taken before the auditor appointed to make distribution, and, when taken, submitted, with evidence produced by respondents, to the court for its opinion as to whether an issue should be granted, "with like effect as though said testimony had been taken under the rule to show cause why an issue should not be granted." The effect of this agreement, as we understand it, was to waive all question as to *laches* in prosecution of the first petition, to treat the amended petition as in substitution for it and accept the answers to the original petition as answers to this, and then consider the question as presented by the evidence produced before the auditor.

It will be observed that at the time the first petition in this case was presented an assignment for the benefit of creditors had been made, and that only one of the creditors had obtained a judgment and execution. Before the second or supplemental petition was filed, a large number of the creditors had obtained judgment, but many others had not. The Act of June 16, 1836, § 45, and the proviso of the Act of April 20, 1846, § 2, refer to sheriffs' and Orphans' Court sales. Judgment and lien creditors have the right to the remedy provided, but contract creditors without judgment or lien have no right to be heard (*Smith v. Reiff*, 20 Pa. 364), and, if successful, enures to the benefit of the parties to the issue: *Shulze's Appeal*, 1 Pa. 251; *Schick's Appeal*, 49 *Id.* 380 and 384; *Thompsons' Appeal*, 57 *Id.* 175.

A question might arise as to the right of the petitioners to this remedy without alleging and showing that the assignee had refused to act, and also as to the rights of the creditors without judgment to benefit by a successful contest. But we think the court has the power to adjust these difficulties, and we prefer to pass upon the merits of the case and apply the rules applicable to proceedings under the Acts of 1836 and 1846.

Before the Act of 1846, it was held that a lien creditor was entitled to an issue as a matter of right, and there are some cases to the same effect since, but in many cases the court exercised a judicial discretion in granting an issue. In the case of *Moore v. Dunn & Fell*, 147 Pa. 359, Judge ARNOLD reviewed the cases very fully and formulated the rule of practice as follows: "To summarize the matter, the proper practice to obtain an issue is for the complaining creditor to file an affidavit that the attacked judgment is fraudulent and collusive and without consideration, and that it is intended to hinder, delay and defraud creditors. On this the plaintiff in the attacked judgment may file an affi-

davit denying the averments; but if he will not, the court should grant the issue as a matter of course. If the plaintiff files a denial, depositions should be taken, and on them the court will determine whether the issue shall be granted, subject to an appeal if the issue is refused, as provided by the Act of 1848. If denial is filed and the applicant will not take depositions, the issue should be refused on the analogy to a bill in equity, where the answer, if responsive, overcomes the bill, unless it is overcome by evidence."

But we do not understand that the court is required to decide that the evidence proves that fraud and collusion exist. If the court was bound to find that fact, it would scarcely be necessary to refer it to a jury. The question submitted to the court is whether or not a substantial dispute exists: *Irvine's Appeal*, 28 W. N. C. 60. "A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. A mere naked allegation, without evidence or against evidence, cannot create a dispute within the meaning of the law." *Knight's Appeal*, 19 Pa. 493. In case of a refusal of an issue, it would be proper to review the evidence, in order to show in what respect it was defective in making up a dispute, and especially because the party is entitled to an appeal and review. But where an issue is granted, it would be manifestly improper to discuss the evidence which is to be submitted to the jury, because, in so doing, it is almost impossible to avoid an expression of opinion as to its weight, which might prejudice the judge in afterward instructing the jury or reviewing their verdict.

Therefore, without expressing an opinion as to the the ultimate result, we have no hesitation in saying that the evidence in this case shows a substantial dispute as to facts which should be referred to the decision of a jury.

For rule, *Samuel S. Mehard*.

Contra, *J. S. & E. G. Ferguson*.

Court of Common Pleas, MERCER COUNTY.

HARVESTER COMPANY v. HODGE.

A new trial will be granted to defendant against whom a verdict has been obtained where it appears that plaintiff's agent, after the jury has rendered its verdict, took one or more of the jurors, at the request of one of the latter, into a cigar store, treated them and the bystanders to cigars, giving the balance in the box to one of the jurors.

No. 136 Jan. T., 1896. Motion for a new trial.

The plaintiff, through its agent, sold a grain binder to the defendant, accompanying the sale with a warranty that it would perform the work to the satisfaction of the defendant. The defense was that the binder did not perform the work in a satisfactory manner. There was a verdict in favor of the plaintiff, and the motion for the new trial subsequently made by the defendant. The first and second reasons were that the verdict was against the charge of the court and the weight of the evidence. The third reason for a new trial is fully set forth in the opinion of the court.

For plaintiff, *James A. Stranahan* and *W. H. Cochran*.

For defendant, *J. J. Alexander* and *Q. A. Gordon*.

Opinion by MILLER, P. J. Filed April 12, 1897.

We would not grant a new trial for the first and second reasons. The third reason raises a question of importance to all suitors. It is not disputed but that Mr. McConnell, the general agent of the plaintiff company, and present at the trial as the representative of the plaintiff, and also an important witness for the plaintiff, did, at the request of one or more of the jurymen who tried the case, and immediately after they had rendered their verdict in court, take such juror or jurors, with other bystanders, to a nearby cigar store and treat them to cigars, giving one of the jurors the box with some cigars remaining in it. Neither is it denied but that the juror, on his way down street from the cigar store, flourished the box and stated that he was presented with the same for the verdict in the case at bar. It is true that not many persons witnessed this inconsiderate act of the juror, but among those who did were the defendant and his attorney. It is true that this occurred after the verdict was rendered in court. Nevertheless, it aroused the suspicions of the defendant and his attorney, and in their minds it naturally cast a certain degree of doubt on the verdict.

TILGHMAN, C. J., in *Ritchie v. Holbrooke*, 7 S. & R. 458, said: "Where one of the parties is charged with a kind of misconduct which strikes at the root of trial by jury, and no attempt is made to contradict or explain it, I am not for being over-scrupulous in weighing the evidence. Where there is improper conduct on the part of a party, the court will not stop to inquire whether the jury was influenced or not."

"Trial by jury," says an eminent judge, "must be kept free from suspicion, or the community will cease to regard it with that confi-

dance which is absolutely essential to its influence and continued life." This is ruled in *Blaine's Lessee v. Chambers*, 1 S. & R. 169; *Bitchie v. Holbrooke*, 7 Id. 458; *Knight v. Freeport*, 13 Mass. 218; *Com'th v. Kauffman*, 1 Phila. 584; *Keegan v. McCandless*, 7 Id. 248; *Elkins v. Gaff*, 2 W. N. C. 586; *Boreland v. St. Clair*, 4 C. C. 541.

In *Elkins v. Gaff*, 2 W. N. C. 586, a verdict was for the plaintiff, and the defendant moved for a new trial, for the reason that, after the verdict was made up and sealed and the jury had separated, one of the jurors, though not so known by the plaintiff, joined a party on the street who were discussing the case. When he came up to the party, he announced that the verdict had been found for the plaintiff. Just before the juror came up, the plaintiff had invited the party across the street to take some wine. The juror went along. But the plaintiff alleged he did not know he was a juror, and there was no evidence that he did. The court said: "It is our duty to see that justice is administered fairly, and with the appearance of fairness, so that no breath of suspicion shall rest upon it. It was a gross impropriety on the part of the juror to announce the verdict as he did, and when that is coupled with the fact that some how or other the whole party adjourned and took a drink, we have no hesitancy in making the rule absolute."

In *Drake v. Newton*, 8 Zabriskie (23 N. J.), 111, the parties to the suit were conducting an arbitration distant from the county seat. The complainant having entertained the jurors with eating and drinking during the progress of the trial, as well as at its close, the verdict, being in his favor, was set aside and a new trial granted. The court in granting a new trial said in part: "The supper was in fact furnished to the jurors before they retired to deliberate on their verdict, and the expense defrayed by complainant. Not only did this occur, but immediately on the rendition of the verdict, if not before, the complainant was guilty of the great impropriety of treating the jurors with liquor, as if in reward for the verdict just rendered. We wish to express our disapprobation of such practices, which are calculated to bring suspicion and reproach upon the administration of justice in those courts in which they occur. A party must not be permitted, directly or indirectly, to prepossess the minds of jurors by unusual civilities or in any other mode during the progress of the trial. The offer of such attentions at its close, and the expectations created by the practice, can scarcely be considered less dangerous and reprehensible.

In the case at bar, the verdict was rendered, and the plaintiff's agent thoughtlessly invited such of the jurors as were present to the cigar store, where he treated them and gave the balance of the box of cigars to a juror. If the verdict had been for the defendant it is not likely that this would have occurred as it did. It is not whether the conduct of the party influenced the verdict. In this case it could not have done so. In all that took place we do not believe there was any intention to do wrong. But that is not the real question. The policy of the law is to maintain verdicts in a purity above suspicion, or, as some judges have said, so that no breath of suspicion shall rest upon them. In the administration of justice we cannot be too careful in guarding the jury-box from every improper influence: *Snyder v. Haas*, 18 C. C. 527.

The verdict must be set aside and a new trial granted.

WESTMORELAND COUNTY.

FERREE v. FERREE.

In an action for divorce on the ground of desertion, where libellant fails to show that the respondent did not intend to resume cohabitation, and there is no evidence of the absence of the plaintiff's consent to the separation, and of the want of justification for it, a case of willful and malicious desertion, within the meaning of the act, has not been made out.

No. 353 Feb. T., 1896. Examiner's report.

Opinion by MCCONNELL, A. L. J.

The rule of court requires the examiner to attach the libel to his report. We could learn therefrom the ground on which divorce is asked in this case. The rule has not been observed in this case. We assume, however, that the ground is desertion, inasmuch as the examiner recommends a divorce on that ground.

The causes that warrant the divorcing of husband and wife are specifically designated in the statute. Among others, the following is adequate cause, viz.: "Willful and malicious desertion and absence from the habitation of the other without a reasonable cause for and during the term and space of two years." The statute does not provide simply that desertion for two years shall be sufficient. The desertion must be willful and malicious and without a reasonable cause. These characteristics are as essential ingredients in the proof of desertion as are the fact of separation and its duration for two years. One of the grounds for divorce from the bonds of matrimony contained in the Act of March 18, 1815, is for willful and malicious desertion and absence of one party from the habitation of the other without reasonable cause for the space of

or during the period of two years. The applicant for a divorce on this ground must establish with sufficient certainty each and every of the ingredients as elements necessary to constitute desertion within the meaning of the act. They must all coexist in proof or no decree can be granted: *Angier v. Angier*, 63 Pa. 458. In *Graham v. Graham*, 153 Pa. 451, "That there was a desertion by the husband may perhaps be conceded, but the evidence fails to show that there was a willful and malicious desertion within the meaning of the Act of Assembly."

In *Ingersoll v. Ingersoll*, 49 Pa. 251, the court say: "Separation is not desertion. Desertion is an actual abandonment of matrimonial cohabitation with an intent to desert, willfully and maliciously persisted in, without cause, for two years. The guilty intent is manifested when, without cause or consent, either party withdraws from the residence of the other. We see no evidence of such intent here. . . . Unable to find satisfactory evidence to support the libel, the decree dismissing it must be affirmed."

Brown on Divorce, pages 142, 143, says: "There must be an intent to desert, willfully and maliciously persisted in, without reasonable cause, for the statutory period. Six things must be shown: 1. The marriage. 2. Cessation from cohabitation. 3. The intention of the defendant not to resume cohabitation. 4. The absence of the plaintiff's consent to the separation. 5. The absence of justification. 6. The continuance of the desertion during the statutory period."

With this idea of willful and malicious desertion fixed in our minds, let us turn to the evidence to see if the proof of it is adequate.

There was no personal service in this case, and therefore the evidence of the wife must be disregarded, except as to the fact of marriage. The statute expressly forbids her testifying generally against her husband under these circumstances. The fact of marriage is sufficiently established by the testimony. The other witnesses are three of her children. They testify to two essential points, viz.: (2) Cessation from cohabitation, and (6) the continuance of the desertion during the statutory period. There is no proof of (3) "the intention of the defendant not to resume cohabitation, (4) the absence of the plaintiff's consent to the separation, or (5) the absence of justification."

Mrs. Carrie DeVine says: "On May 24, 1893, my father left home. He was never at home since, and he never gave any support to my mother or her family. My mother has lived in Latrobe ever since. My father never came back home since the time he left."

Mrs. Maggie Green says: "My father disappeared (May 24, 1893,) and never returned to his home to my knowledge. My mother still lives in Latrobe, at the same place she lived when my father was there. Since my father left home, in May, 1893, he never supported his wife and family."

John Ferree says: "My father was never at home since. He has been absent over three years. He never sent any money home for the support of my mother and family. I do not know where he is now."

We might safely conclude from this that he was absent from home, and had not furnished support during the period of his absence; but what is there to justify the conclusion that there is an intent to desert willfully and maliciously persisted in without cause? Under what circumstances did he leave home? Why did he disappear? Is he able to furnish support? For aught that appears he may be sick in a hospital or an asylum. If so, there is no desertion: *Neely v. Neely*, 131 Pa. 552. He may be unable to support his wife. This will not constitute desertion: *Ingersoll v. Ingersoll*, 49 Pa. 249. He may have been crowded out of his home. If so, his absence will not be desertion: *Graham v. Graham*, 153 Pa. 450.

"A divorce will not be granted on the ground of desertion when the facts and circumstances are not so testified to that the court can determine whether they constitute willful and malicious desertion. It is not sufficient for the libellant merely to testify that her husband has deserted her:" *Detrick v. Detrick*, 6 Kulp. 164.

Failure to support may or may not be evidence of a malicious and willful desertion. Whether it is or not depends on the existence of circumstances. No circumstances are here shown sufficient to make such failure adequate proof of a willful and malicious desertion.

"A malicious desertion by the husband is not established by mere evidence of the wife's return to her former home and her non-receipt of any support from him:" *Grimes v. Grimes*, 12 Lancaster, 23; *Bell v. Bell*, 11 W. N. C. 156. "Facts must be proved to show the desertion, and that it was willful and malicious:" *Williams v. Williams*, 1 Woodward, 308.

The facts shown in this case do not establish that there was an intent to desert, willfully and maliciously persisted in, without cause, by the defendant. Therefore no right to a divorce is shown. If such right exist proof should be made of it. We therefore dismiss the application at plaintiff's costs.

For petitioner, *John Latta and John W. Sarver*.

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PITTSBURGH, PA., JUNE 23, 1897.

Supreme Court, Penn'a.

COUNTY of ALLEGHENY v. GRIER.

The Act of May 7, 1864, which fixes the salary of the controller of Allegheny county at \$3,000, is not repealed by the Act of March 31, 1876, relative to the payment of salaries of county officers in counties containing over 150,000 inhabitants.

A county can compel a county controller to refund a sum of money which has been received by him in excess of the salary fixed by law.

Appeal of James A. Grier, defendant, from the judgment of the Court of Common Pleas No. 1, of Allegheny county.

This was an action of *assumpsit*, brought in August, 1895, by the county of Allegheny, by two of its three commissioners, against James A. Grier, to recover \$1,290.32 with interest from April 30, 1892, on the ground that this amount in excess of his salary, as fixed by law, had been paid to him, by a mistake of law. The defendant demurred to the plaintiff's statement for the following reasons: (1) at the date of the payments mentioned in the plaintiff's statement the salary of the office of controller of Allegheny county was not payable under the Act of May 7, 1864, entitled "An Act relating to Allegheny county;" (2) the salary of said office at that time was as fixed in the general act, approved May 11, 1881, P. L. 21, and entitled a supplement to an act entitled "An Act to carry into effect section 5, of Article 14 of the Constitution, relative to the salaries of county officers and the payment of fees received by them into the State or county treasury, in counties containing over 150,000 inhabitants and approved the 31st day of March, 1886, amending section 13 of said act;" and under said act the salary of the controller was \$4,000; (3) in any event the payments made to this defendant and sued for were voluntary payments.

For appellant, *W. B. Rodgers* and *J. H. Beal*.
Contra, *N. S. Williams*.

Opinion by STERRETT, C. J. Filed January 4, 1897.

The principle which underlies the construction heretofore given the Act of 1876 and its supplements is too plain for question. The Constitution had declared that in counties of a speci-

fied class, their officers should be paid by fixed salaries; and the Legislature sought by that act to accomplish this purpose. It accordingly struck down all prior acts which provided for the payment of such officers in fees as being necessarily inconsistent with the constitutional mandate; and hence *McCleary v. County*, 163 Pa. 578, and allied cases; and left those acts which provided for the payment of fixed salaries, because consistent; and hence *Bell v. County*, 149 Pa. 381. The operation of the act was limited by the accomplishment of its purpose. The Act of 1861 being in entire harmony with the constitutional intent, it would have been vain and useless to have stricken it down. The Act of 1864 which fixed the controller's salary belongs to the same category, and hence the court below was clearly right in holding that the present case is not distinguishable, in this respect, from *Bell v. County*, *supra*. The Act of 1864 being in force, the amount received by the controller in excess of the salary there fixed was therefore illegal. So on grounds of public policy, the court was right in holding that the maxim *voluntati non fit injuria* has no application to the illegal payment of public funds to a public officer,—more especially where as here it is the peculiar function of that officer to guard the public treasury. Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer to a suit brought by a trustee to recover private trust funds that he had been a party to the *devastavit*. There could be no retention by color of right: *Abbott v. Reeves*, 49 Pa. 494. With much the stronger reason is this doctrine applicable where the interests of the whole people are involved; and the authorities are accordingly numerous to this effect: *New Orleans v. Flinnerty*, 27 La. Ann. 681; *Com'th v. Field*, 84 Va. 28; *Day Land & Cattle Co. v. State*, 68 Texas, 528; *American Steamship Co. v. Young*, 89 Pa. 191; *Taylor v. Board of Health*, 31 Id. 736; *Smith v. Com'th*, 41 Id. 335, and cases cited. It is obviously immaterial whether the illegal payment be through design or mistake; for in either event the result must be not only misuse of trust funds, but what is of far more importance, demoralization in the service. The only practical difference lies in this; that one makes a criminal and the other a trustee. So it is immaterial by what officer the funds are had and received, fidelity to the government, which he represents and is sworn to support, makes restitution a duty. Even a tenant may not question his landlord's title, and much less may a public servant, that of his sovereign. He can plead neither *laches* nor *estoppel in pais* to a suit for malversation. Public office is a pub-

lie trust; the sanctity of public property is essential to its due administration; and necessarily implies a remedy for every diversion from legitimate use. The attributed effect of the filing and advertisement of the controller's annual report, so far as relates to his salary, is without merit. The report is given the "effect of a judgment against the real estate of the officer who shall thereby appear to be indebted to the county;" but the Act of 1861 does not contemplate that the controller shall become "indebted." He has no power to handle public funds. He is the fiscal officer of the county and, as such, it is his duty to take notice of illegal disbursements of the public funds, and charge the officer who is guilty of misappropriation. This is the only protection the people have against the illegal acts of those who have charge of their pecuniary interests: *Commissioners v. Lycoming Co.*, 46 Pa. 496. Chosen by the people to watch and take care of these interests, it cannot be expected that they shall in turn keep a watch on him.

The suggested hardship of compelling the controller to refund is more specious than real. The adoption of the constitutional provision marked a radical change of policy and should have put him on his guard. As the fiscal officer of the county he was bound to take notice that the construction of the Act of 1876 was open to question, and that without the aid of the courts he must act at his peril. His responsibility is not answered by the plea of inconvenience. The county would soon fall into a condition of hopeless insolvency if the "retarding friction" of personal inconvenience were once recognized as a principle of defense to the enforcement of its dues. It follows that there is no error in the judgment and it is therefore affirmed.

SHRADER v. UNITED STATES GLASS CO.

Plaintiff in an action of ejectment claimed title to the land in dispute through sheriff's sale upon a judgment note entered of record in 1884. The defendant claimed title through a sheriff's sale in 1887 upon a mortgage given by the same person as the note, but prior to it in date. At the trial plaintiffs claimed that the title relied upon by defendant, was invalid because the mortgage upon which the property was sold had been paid before the *sci. fa.* was issued, and offered in evidence several receipts for money paid the mortgagor, the genuineness of which was denied by the defendant. The record showed the issuing of the *sci. fa.*, the sale upon the *lev. fa.* and the deed to defendant, and the evidence of defendant was strong to the effect that the receipts were forgeries. Held to be error for the court to charge that the burden was upon the defendant to satisfy the jury that the receipts were forgeries, as alleged, and that the burden of proof had shifted from the plaintiff to defendant.

Appeal of the United States Glass Company,

defendant, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, in an action of ejectment brought by John Shrader.

This was an action to recover a tract of land situate in Pointview borough, formerly Lincoln township, Allegheny county, Pa., containing 9 acres and 60.5 perches. Both plaintiff and defendant claimed under a common source of title, to wit, Frederick Rhodes, who acquired title to the land by deed from David Rhodes and wife, dated May 11, 1867. Rhodes mortgaged the premises to Benjamin Coursin, guardian of the children of David H. Rhodes, by mortgage dated May 18, 1872. On this mortgage a *sci. fa.* was issued in the Court of Common Pleas No. 1, at No. 477 June Term, 1887, on which judgment was obtained, May 5, 1887, for the sum of \$4,262.22. On this judgment a *lev. fa.* issued, and the property was sold by the sheriff, at No. 126 June Term, 1887, to Benjamin Coursin, to whom the sheriff executed a deed acknowledged July 2, 1887, duly recorded. By divers mesne conveyances the title of Benjamin Coursin vested in the United States Glass Company, the defendant in the ejectment, and the present appellant. The plaintiff deduced title from Frederick Rhodes in the following manner: A judgment was obtained by S. O. Rhodes against Frederick Rhodes at No. 293 April Term, 1888, d. s. b. On this judgment, which waived inquisition and condemnation, the property was sold on *fi. fa.* No. 107 January Term, 1884, to William Shrader, to whom the sheriff executed a deed on January 19, 1884. Frederick Shrader obtained a judgment against William Shrader in the United States Circuit Court at Pittsburgh, on which William Shrader's title was conveyed by the United States Marshal to Frank Shrader by deed acknowledged November 16, 1888. William Shrader's title was also conveyed by the sheriff, by deed acknowledged June 22, 1889, to Thomas B. Hutchinson, who conveyed his title acquired to Frank Shrader by deed dated March 22, 1890. Frank Shrader then mortgaged the premises to Thomas B. Hutchinson, who sued upon the mortgage, and by proper proceedings sold the property at sheriff's sale, the sheriff conveying to the purchaser at that sale, John R. Gregg, by deed dated September 2, 1892. William Shrader and Frank Shrader then, by quit-claim deed dated August 15, 1892, quitclaimed the premises to John R. Gregg, and John R. Gregg, by quit-claim deed dated November 30, 1892, the premises to John Shrader, the present plaintiff.

For appellant, *John S. Robb, Willis F. McCook and J. S. Ferguson.*

Contra, S. R. Huss and J. M. Garrison.

Opinion by GREEN, J. Filed January 4, 1897.

The title of the defendant, being acquired under a sheriff's sale upon proceedings on a mortgage which was prior in time to the judgment, upon the proceedings under which the plaintiff's claim of title was founded, was the superior title. Before the plaintiff could recover he was obliged to establish a title, the practical effect of which, was to invalidate the title of the defendant, acquired under the mortgage. In the *scire facias* on the mortgage, judgment was recovered on May 5, 1887, for \$4,262.22, and the sale under that judgment was the source of the defendant's title. The only reply made to this title was that the mortgage under which the sale took place was paid off in full before the sale and, therefore, the sale passed no title to the defendant's predecessor in the title. As this defense involved not only the validity of the mortgage, but also of the judgment obtained in an adversary proceeding on the mortgage, the task of the plaintiff was a very serious one, especially as the defendant claimed title under judicial proceedings which were perfectly regular on their face, and the defendant was an innocent purchaser. No less than three solemn records were involved, besides the good faith of the parties. First the mortgage, then the judgment, and third the sheriff's deed were all involved, and unless the plaintiff could defeat them all he had no valid claim of title against the defendant. It cannot be doubted that the whole burden of defeating such a title rested upon the plaintiff. He undertook to discharge it. The mortgage was dated May 18, 1872, and was made by Frederick Rhodes, the then owner, to Benjamin Coursin, guardian of the children of David H. Rhodes. The writ of *scire facias* was issued on this mortgage to June Term, 1887, and judgment for \$4,822.22 was obtained on May 5, 1887. The property was sold to Benjamin Coursin, and a sheriff's deed to him was delivered on July 2, 1887. In the meantime the title of the mortgagor, Frederick Rhodes, had been sold by the sheriff under an execution issued upon a judgment obtained at April Term, 1883, and on January 19, 1884, a sheriff's deed was delivered to William Shrader. As this judgment was long subsequent to the mortgage, the sale did not discharge the lien of the mortgage, and the purchaser held title subject to that lien.

In 1888, the land being in the possession of John Shrader, the present plaintiff, under a demise from his father, William Shrader, who had purchased it at the sale under the judgment, Benjamin Coursin, the purchaser at the

sale under the mortgage, brought an ejectment against him to recover possession of the land. On the trial of that action John Shrader made defense that the mortgage had been paid to Coursin, the plaintiff, but the verdict and judgment were in favor of Coursin. On appeal to this court the judgment was affirmed on the ground that the court below had left the question of payment fairly to the jury, who found by their verdict that the mortgage had not been paid. In these circumstances the defendant in that case brought the present (second) ejectment, for the same land, and set up the same matter that was in controversy on the former case, to wit, that the mortgage had been paid off before the judgment on the *sci. fa.* had been obtained. As the maintenance of this claim was essential to the plaintiff's right of recovery the burden of proving it rested upon the plaintiff from the beginning to the end of the case. He undertook to prove the payment, not by proving the fact of payment directly, but by giving in evidence certain receipts which might or might not show payment of the mortgage, according to the force and effect of other facts in evidence. Among other things the defendant alleged, and gave evidence to prove, that the receipts, given in evidence by the plaintiff, were not genuine. Expert testimony was taken on both sides of this question, and other facts were given in evidence as bearing upon the question. The learned court below, upon the question of the signatures to the papers, charged the jury thus, "These papers are set up and proved by the plaintiff in the first place. The defendant says they are not genuine, and it ought to satisfy you of that fact. I do not know however that I ought to throw the burden of proof upon either side in a question of that sort. It is a mere question for you gentlemen, and I will not throw the burden of proof upon either side upon that question of forgery. Only this, that in a case like this, these papers are presented here formally, and if alleged to be forgeries, it is an imputation of dishonesty, and there is a presumption in favor of honesty always. I think after all the burden is upon the defendant to satisfy you that they are forgeries as it alleges." We are unable to agree to this doctrine. The case is not one of a shifting burden of proof, changing from one side to the other during the course of the trial. The defendant had a right to rest upon its title under the mortgage. It was perfectly regular in all respects, and apparently, and on the state of the record just as it stood, the plaintiff's claim was entirely worthless as against the mortgage. If no evidence was given except the records of the two titles just as they stood, as a

matter of course, the verdict would necessarily be for the defendant. The fact of payment of the mortgage was an affirmative fact which it was the clear duty of the plaintiff to establish, and to establish it by clear and satisfactory testimony. And it was a more than ordinarily serious burden, for it was an undertaking, not only to prove payments which might or might not be made upon account of the mortgage, but much more than that. A judgment had been recovered in an action upon the mortgage long after the alleged payments were made, and the presumption would naturally be very strong that if the alleged payments had actually been made on the mortgage, the judgment could not have been recovered for the whole amount. But in addition to that, a judicial sale was had upon the judgment, and a sheriff's deed was executed and delivered to the purchaser for the land, and all of these records and proceedings were to be set aside by proof of a receipt for a note and an order on another person for the payment of a sum of money, when the aggregate of the note and the order was not nearly so much as the amount of the mortgage. It is certainly true that when these papers were offered and admitted, they were open to any reply that could be made against them, and when their authenticity was denied by the adduction of testimony hostile to their integrity, it cannot be possible that the burden of proof was changed, and instead of the plaintiff being obliged to prove payment, the defendant was bound to prove nonpayment. When the plaintiff offered the receipts in evidence it was a necessary part of his duty to prove their execution. This put the fact of execution in issue, and the plaintiff had the affirmative of that issue to establish. As a matter of course the defendant was at liberty to attack them by whatever testimony it could, either by showing non-execution, or by proving any facts inconsistent with either their validity, or the right of the plaintiff to use them as a reply to the particular mortgage in question. On their face they do not purport to be payments on account of this identical mortgage, and hence further evidence was necessary to establish the connection. But in any and every point of view, they were only capable of use as being evidence, in some degree, of the leading fact of payment of the money. That was the main fact in issue, it was absolutely vital to the plaintiff's right of recovery; the fact of actual payment, and the only means of proof offered in the case, was by certain papers which had no force of themselves, and no place in the cause except by proof of their execution. That fact also was not proved except by testimony to

prove the handwriting of the signatures. And the very best that could be said of them after that testimony was delivered, was that the receipts were but *prima facie* proof of payment, they concluded nobody; the actual fact of their execution was still an open question to be determined by the whole, and not a part, of the proof in the cause. That proof included not only what was offered by the plaintiff, but also what was offered by the defendant, and the entire question was for the jury upon all the testimony affecting that subject.

The foregoing considerations are rendered more important in view of the fact that the genuine character of the papers in question was most forcibly and vigorously attacked by the testimony of the defendant. Benjamin Cousin, whose name and writing appeared in the disputed papers, was examined on the former trial, and denied in the most positive and emphatic manner that he ever wrote or signed either of the two which were claimed to be written or signed by him. He testified also that he had never seen or heard of them, or had any knowledge of them. He died after that trial and before the trial of the present case, but his testimony on the former trial was given in evidence in this, and witnesses were also examined who testified directly to what he said on the first trial. In addition, three of his sons were examined, all of whom denied that the writings or the signatures were his. Also a number of gentlemen having the greatest familiarity with him and his writings, testified that the writings and signatures in question were not genuine. A few witnesses, including two experts, testified to the contrary for the plaintiff, but we feel constrained to say that the volume and weight of the testimony on this subject were with the defendant. This being the state of the controversy, and of the testimony on the trial, we think it was serious error to charge the jury that a presumption of innocence arose in favor of the papers, and that thereby the burden of proof was shifted from the plaintiff, who asserted the papers, to the defendant who responded to them and denied them. In all actions and proceedings where the plaintiff claims to recover upon paper writings it is his duty to prove them against all attacks, and that duty remains throughout.

There is an additional reason for reversing the judgment, on account of the charge being uncertain and therefore misleading on this subject. The learned judge of the court below was evidently in doubt upon the question, and charged in contradictory terms, saying at one time that he thought he ought not to put the

burden of proof upon either party, but he afterwards changed his mind and did expressly put it all upon the defendant. The first assignment of error is sustained. As to the second we think it is without merit, especially as the testimony of Benjamin Coursin taken on the first trial, was given in evidence on the trial of the present case.

Judgment reversed and venire de novo awarded.

EDWARDS v. ALLEGHENY COUNTY.

The Act of 1871, which fixes the salary of the assistant district attorney of Allegheny county at \$1,500 a year, is not repealed by the Act of June 16, 1891, which fixes the salary of the first assistant district attorney in counties having over 500,000 population and less than 800,000 at \$4,000 a year, and the assistant district attorney draws his salary under the former act.

Appeal of Albert J. Edwards, plaintiff, from the judgment of the Court of Common Pleas No. 1, of Allegheny county, to recover compensation for services as assistant district attorney.

The facts appear by the opinion of the Supreme Court, *infra*.

For appellant, *Watson & McCleave* and *G. W. Williams*.

Contra, *W. B. Rodgers*.

Opinion by McCOLLUM, J. Filed May 18, 1897.

The question on this appeal is whether the assistant district attorney of Allegheny county is entitled to a salary of \$1,500 a year or to a salary of \$4,000 a year. In 1871 his salary was fixed at the former sum, and it has been regularly paid to him since. It is his salary now, unless the Act of 1891, P. L. 314, has changed it. The court below held that the salary as fixed by the Act of 1871 has not been changed by subsequent legislation, and entered a judgment accordingly.

The Act of 1891 fixes the salary of the first assistant district attorney in counties having over 500,000 and less than 800,000 inhabitants at \$4,000 a year, and the contention of the plaintiff is that, as he is the only assistant district attorney in Allegheny county, he must be considered as within the purview of the act, and entitled to the salary attached to the office of first assistant district attorney in counties of this class. The contention, however, assumes too much. It is not a necessary conclusion from the undisputed fact on which he relies that he is entitled to the salary he claims. The duties which pertain to the office he now holds are specifically defined by the act which created it, and they have

not been changed by the Act of 1891 or any other act. The office was created for Allegheny county by the Act of February 6, 1867, P. L. 140. No other county in the Commonwealth has such an office. In *Com'th v. Grier*, 152 Pa. 183, EWING, P. J., said of it: "The office of assistant district attorney in Allegheny county is an anomaly in the law of Pennsylvania. The office was created in fact for a special purpose, and has been continued because it is difficult to repeal such an act. The officer is in no way dependent on the district attorney, nor accountable to him, nor can he be called on officially to assist him. The duties are specified in the act, and he is made an assistant only in name." It is an elective office, and the person chosen to fill it is entitled to hold it for the term of three years, subject, however, to removal therefrom for such causes as authorize the removal of a district attorney. The duties of it are defined in section 5 of the act which created it as follows: "It shall be the duty of said assistant district attorney to attend to all preliminary hearings in criminal cases arising in said county when the public interests may require it; to prepare all bills of indictment for offenses cognizable in the courts having jurisdiction thereof within said county, and to submit the same to the grand jury with the Commonwealth testimony and to affix to said bill of indictment the name of the district attorney; provided that nothing herein contained shall interfere with the right of the district attorney to prepare a bill of indictment *ex officio* as heretofore when proper occasion may arise." By the Act of 1867 the assistant district attorney was allowed as compensation for his services one-third of the fees pertaining to the district attorney's office. By the Act of 1871, P. L. 476, these fees, when collected, were payable into the county treasury, the salary of the district attorney was fixed at \$4,000, and the salary of the assistant district attorney at \$1,500. The Act of 1891, if applicable to the anomalous office of assistant district attorney of Allegheny county, would add 166⅔ per cent. to the salary of the plaintiff, while it adds but 50 per cent. to the salary of the district attorney. It seems to us that the assistant district attorney of Allegheny county is not a first assistant district attorney, within the scope and meaning of the Act of 1891. As we have already seen, his duties are limited to preliminary hearings in criminal cases, to the preparation of and affixing the name of the district attorney to the bills of indictment, and to the submission of the same, with the Commonwealth's testimony, to the grand jury. In the performance of these duties he is in no sense subordinate to the dis-

strict attorney, but, on the contrary, he is absolutely independent of him. He cannot be officially called to the assistance of the district attorney in the performance of the duties that remain to him. This, we think, is not the kind of assistant district attorney who is entitled to the salary which the plaintiff now claims. In our opinion, the Legislature, in fixing the salary of a first assistant district attorney, had in view an officer who was an assistant of, and subject to, the district attorney in the performance of the duties of his office, and not an officer who was independent of the district attorney, and whose duties were defined by a special act. As we think that Act of 1891 has no application to the office of assistant district attorney created for Allegheny county by the Act of February 6, 1887, it is not necessary to consider whether the plaintiff now holds a salaried office or a fee office. We may say, however, that, as we understand the facts, the incumbent of the office has received no fees for his services since 1871, and that since that time the county has paid to him the full salary of \$1,500 a year. We do not discover in the Act of 1871, nor in any subsequent act, anything to warrant a conclusion that he is now entitled to fees.

Judgment affirmed.

STEPP v. FRAMPTON.

Plaintiff, a man of seventy-five years of age and the owner of considerable property, about four years before suit was brought became acquainted with the defendant, a young man who called at the house for the purpose of selling plaintiff an organ. In the course of nine months he was an intimate friend of plaintiff and his family, wrote his will, and was one of his executors. He then entered into business transactions with the latter, taking from him oil and gas leases on his farm, which was not developed, in consideration of one-eighth royalty. In the course of a few months defendant resells to plaintiff a fractional interest in the leases on the latter's farm together with interest of the defendant in oil and gas leases on other farms for \$18,500, for which plaintiff paid defendant in part by assigning to him a mortgage for \$12,000. Plaintiff then filed a bill in equity to annul the assignment of the mortgage, alleging false and fraudulent representations on the part of the defendant, who denied all the material averments of the bill, and alleged that the transaction was for the purpose of raising money to pay the expenses of oil and gas developments in pursuance of an agreement. The evidence showed that plaintiff, who had always been a thrifty and saving man, had become at the time he met the defendant weakened mentally and physically. The leaseholds of oil and gas had no market value. *Held*, these facts were sufficient to justify the finding that the assignment of mortgage was procured by fraud and the relation existing between them was of such a confidential nature as to throw upon defendant the burden showing the transaction was fair, open, honest and well understood.

Appeal of Alvin Frampton, defendant, from the decree of the Court of Common Pleas No. 3, of Allegheny county, on a bill in equity filed by John Stepp for the cancellation of an assignment of mortgages.

The facts sufficiently appear in the opinion of the Supreme Court, *infra*.

For appellant, *M. H. Stevenson*.

Contra, Kennedy & Smith.

Opinion by DEAN, J. Filed January 4, 1897.

John Stepp, plaintiff, resided at Tarentum; he had married twice, and by his first wife had a grown-up family of children, who had left home, married and were in business for themselves. By the second wife, he had two children, ten and twelve years of age, these with their mother constituting the family. Stepp, in the spring of 1891, was about seventy-five years of age; he was the owner of a considerable estate of personalty, an improved farm in Armstrong county, a valuable hotel property in Tarentum, and the property in which he lived. At this time, defendant made his acquaintance; he called at the house ostensibly for the purpose of selling him a cabinet organ; no sale was made, because Stepp was then the owner of one. But Frampton's visits did not cease and he soon got on intimate terms of friendship with the family. The degree to which the intimacy had grown may be inferred from the fact, that Frampton who, nine months before had been a total stranger, became in January, 1892, Stepp's adviser and scrivener in so important a matter as the making of his will; besides, the testator had such confidence in him, that he appointed him one of the two executors thereof, his widow being the other; very large powers were given the executors, as well as authority to collect and pay over large sums of money to his children, with the direction that no change should be made in the will by "any court by virtue of any adverse laws that are now in force, or that may be thereafter enacted." The intimacy continued after this until October 17, 1892, when Frampton executed a judgment note for \$300, which Stepp in writing guaranteed, and on which Frampton received from the First National Bank of Tarentum the money; this note Stepp paid to the bank. Again, on March 16, 1893, Stepp became Frampton's surety in a judgment note for \$420 on which Frampton received the money from a bank, and which Stepp also paid. On March 29, 1893, Stepp executed to Frampton an oil and gas lease for a term of fifteen years on his farm of two hundred and fifty-two acres in Buffalo township, Armstrong

county, for a consideration of one-eighth of the oil, and if a paying quantity of gas struck, then \$200 per annum for each well. This lease was on a wholly undeveloped property, and was signed by Stepp and Alvin W. Frampton, the real name of defendant; there is but one subscribing witness, J. W. Frampton; defendant, in his testimony, admitted that he signed both names, and this is his explanation: "I signed J. W. Frampton for convenience if anything happened Mr. Stepp, I could testify that was his signature, and put it on record if my name was there." Forty-one days after this lease, May 9, 1895, Frampton assigned to Stepp the one undivided half of the lease taken on his own farm, and the undivided half on ten smaller farms, the whole making eight hundred and seventy acres, for value received, no other consideration being named in the assignment. In thirty days afterwards, on June 9, 1893, he assigned to Stepp for the consideration of \$3,000 the undivided half interest in the same leases and additional ones, making one thousand two hundred and twenty-two acres, then follow other assignments at dates in a little more than a month, of fractional interests for the expressed consideration of \$3,000 to \$5,000,—with this result, that Frampton, on the undeveloped territory in this brief time, resells to Stepp fractional interests for an aggregate sum of \$18,500; and if the expressed fractional interests be summed up, he has resold to Stepp more territory than exists, for he has resold him twenty-two twelfths of his own farm, seventeen-twelfths of the eight hundred and seventy acres, and five-twelfths of the one thousand two hundred and twenty-two acres.

The consideration for these assignments was partly paid to Frampton by Stepp, by assigning to him mortgages aggregating \$12,000 on a hotel property in Tarentum. So far as we have thus narrated the facts, they are undisputed. Within fifteen days after the assignment of the mortgages, plaintiff filed this bill averring the assignment was obtained from him by false and fraudulent representations on part of Frampton, and praying it be canceled and the securities be redelivered to him. Defendant denied all the material averments of the bill and alleged that an agreement had been entered into between him and Stepp to develop the oil and gas territory, and the whole transaction was for the purpose of raising money to pay the expenses of the development. The case was referred to J. M. Stoner, Esq., as master to find facts, state his conclusions of law, and suggest decree. Much evidence was taken, some of it of a contradictory character. The master finds, how-

ever: (1) That the leaseholds of the oil and gas territory had no market value. That John Stepp was seventy-five years old, and had for two years previous been very infirm physically and mentally. (3) That the relation between Stepp and Frampton at the date of the assignment of the mortgages was of a confidential character.

His conclusion from all the testimony is, that the assignments were procured by fraud and undue influence practiced by Frampton, and he thereafter suggests a decree that they be canceled, and the securities redelivered to Stepp. His report was confirmed by the court below, and decree made accordingly, and now defendant appeals, assigning for error the master's findings of fact and conclusions of law.

There was abundant evidence to warrant the master in finding that plaintiff at the date of the assignment was physically and mentally infirm, not alone because of advancing years, but also by reason of severe and protracted disease, and that Frampton was confided in by him. For thirty-five years he had been an industrious, thrifty farmer, and had accumulated a competence; he then retired from active business and took up his residence in Tarentum; there he had lived for seven years when Frampton made his acquaintance. His physician and near neighbors testified to his failing health and weakened mental powers at that time. The very fact that a man whose whole life had been a cautious, saving one, should, in old age, enter on a wildly speculative one, thereby periling his entire estate, at once suggests inquiry as to the cause. It is found he has become bodily and mentally infirm; then appears a new acquaintance, a young man only thirty-five years of age, who, according to his own admissions, is without means, but who, to use no stronger terms, is a speculator in oil and gas territory, a projector of enterprises for development; after a few months of intimacy the old man changes the business methods of a lifetime, and enters deeply into a speculative oil project. On examining into the nature of this intimacy it is found the old man has learned to confide in the younger; has consulted him in matters of the most delicate and confidential nature, such as how he shall distribute his property among his family; further appoints him, although irresponsible financially, one of his executors; gets him to make the entries of births and deaths in the family Bible; the young man cheers and nurses him in sickness; frequently accepts his hospitality as to lodging and board; borrows money from him to pay his expenses of a political campaign when he was a candidate. De-

defendant admits they were close friends, and that they (Stepp and wife) consulted him as to business matters and he advised them. While we do not undertake to say it is absolutely certain a confidential relation existed between these two men, of which defendant took advantage to defraud the one who confided in him, we do say the evidence was ample to warrant such a conclusion by the master. We have no doubt, as argued by appellant, this old man's cupidity was aroused by the plausible statements of the projector and speculator, and that he expected to make millions out of the transaction; but this does not prove the bargain an honest one; it only shows that the man, who during a long life when his mind was strong shunned such operations, now, when weakened by disease and age, and leaning on one in whom he confided, made an absurdly disastrous bargain. All frauds perpetrated on the weak and confiding are successful only because they are susceptible to influences which the ordinarily strong and self-reliant resist. A confidential relation such as the law infers always exists as between parent and child, guardian and ward, counsel and client, principal and agent, but it also exists in numerous cases where only the facts warrant the inference. Beach on Equity, 125, says: "But when the relations existing between the contracting parties appear to be of such a character as to render it certain that they do not deal on equal terms, but that on the one side . . . from overmastering influence, or on the other side, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered *probable*, then the burden is shifted, and the transaction is presumed void, and it is incumbent upon the party in whom such confidence is reposed . . . to show *affirmatively* that no deception was used, and that all was *fair, open, voluntary and well understood*. This principle is of very general application . . . and the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise."

And that is the principle announced by this court in *Hetrick's Appeal*, 58 Pa. 477. The gross inequality of the bargain here startles the mind; when this is followed by evidence of physical and mental infirmity on part of the loser, and of a confidential relation between him and the gainer, the burden is on the latter to satisfy the chancellor that all was fair, open, voluntary and well understood. In this, as the master has found, defendant wholly failed. What we have said disposes of all appellant's assignments of error.

The decree is affirmed and appeal dismissed.

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

RITCHEY v. RITCHEY.

A divorce will not be granted on the grounds of adultery when the testimony on behalf of libellant proves nothing except the declarations and admissions of respondent regarding his adultery with another woman which are not supported by any sufficient or proper corroborating circumstances.

No. 608 Jan. T., 1896. Libel in divorce.

Opinion by FRAZER, J. Filed March 20, 1897.

This is an application by a wife for a divorce from her husband on the ground of adultery.

It appears from the petition that the libellant and respondent were married on April 17, 1880, and lived and cohabited together until November 4, 1895; that the respondent was guilty of adultery with a certain female whose name is therein set forth, "and with other persons to your petitioner unknown."

The subpoena was awarded to the first Monday of January, 1896, and was served on the defendant at the court-house, Pittsburgh, on December 16, 1895. The defendant not appearing or answering, a commissioner was appointed on March 20, 1896, to take testimony.

The testimony returned by the commissioner shows that only three witnesses were examined, the first being the libellant herself. She testifies to her marriage with the respondent, and that they lived and cohabited together until "after I found out that my husband was the father of Nora Lowry's child, when I left him." No date is given. The libellant, after testifying that she went to Cincinnati in September, without stating the year and the length of time she remained there, says: "Our house was occupied by my husband and Nora Lowry during my absence, and the following May there was a child born to Nora Lowry, who still lived at our house. Nora Lowry and my husband both acknowledged to me that my husband was the father of her child." The next witness, after stating that she is acquainted with the libellant and respondent, says: "The child of Nora Lowry resembles respondent, James G. Ritchey, in many ways, especially about the eyes; the eyes of the child are blue, just like Mr. Ritchey's." The third and last witness, the doctor who attended Nora Lowry at the time her child was born, says: "She neither then nor at any subsequent time said anything about the paternity of the child. Prior to the birth of the child, and subsequent to it, James Ritchey admitted to me in conversation that he was its father. The child

has such a striking resemblance to Mr. Ritchey that it would suggest the relationship existing between them at once, and to anyone."

This is the evidence upon which we are asked to grant this divorce; that the husband acknowledged to his wife and another that he had been guilty of adultery. Such testimony is not sufficient to justify a court in granting a decree of divorce; it proves nothing except his declarations and admissions, which may or may not be true. The circumstances under which these admissions were made are not given to aid us in determining whether or not they are worthy of belief. Neither are they supported by any sufficient or proper corroborating circumstances. If divorces are to be granted upon such evidence, the conjugal tie would become most insecure, as either party could at any time and at any place manufacture by loose conversations sufficient evidence to warrant the court in divorcing the parties. The testimony as to the resemblance of the child to the respondent is of such a character as to have no weight in determining this case; it practically amounts to nothing as corroborative evidence of the respondent's admissions. Again, the fact that the libellant does not show that she left her husband immediately upon learning of his infidelity, that she continued to live with him, according to her petition, for at least six months after the child of Nora Lowry was born, and that the respondent conveniently dropped into the sheriff's office to be served with the subpoena just fifteen days before its return-day, indicates collusion to my mind.

For the reasons above given a decree for divorce is refused.

For libellant, *J. R. Henderson.*

Orphans' Court.

In re Estate of JAMES H. LINDSAY, Deceased.

A rehearing will only be granted where (1) there is error of law appearing on the face of the record, or (2) some new matter which has arisen since the entry of decree, or (3) evidence has since been discovered; and these must be material to the main issue.

In re exceptions to adjudication, and petition for rehearing.

Opinion by HAWKINS, P. J. Filed June 19, 1897.

(1) Further reflection has only served to strengthen the view heretofore taken in this case, and the exceptions thereto must be dismissed.

(2) There is a rule of courts of equity which

has been uniformly followed since it was laid down by Lord Chancellor BACON, that bill ne of review shall be admitted except it contains,—

(a) either error of law appearing in the body of the decree, without further examination of matters of fact, or

(b) some new matter which has arisen in time after the decree, or

(c) could not possibly have been used at the time the decree was made.

The reason which underlie the rule is the policy of the law to put an end to litigation. Every litigant is entitled to his day in court; but in view of the large volume of business which constantly flows in and the time required in hearing, it is obvious that if the practice should prevail of granting rehearings as of course, the time of the court will be so occupied as to amount to a practical denial of justice to other litigants. The old English chancery practice of granting rehearings on the certificate of counsel was found to be a source of oppressive delays and gross injustice and accordingly has been regarded with disfavor in the United States. "It is no small recommendation or our practice," said the court in *Jenkins v. Eldridge*, 3 Story, 299, "that it thereby requires on the part of counsel a thorough examination and preparation for the hearing; and on the part of the court the most solicitous and exact study of the whole case before judgment is pronounced. The other course would encourage inattention and indifference, and induce counsel as well as parties, to speculate on contingencies, and to argue the case at large only when the court had the deliberated result of its opinion." If rehearings were to be had until counsel on both sides should be satisfied, final decision must in most cases be indefinitely postponed and the administration of justice defeated: Story's Eq. Pl., § 421, and notes. Strict adherence to the rule, which has been stated as governing reviews, is peculiarly appropriate to this court because of the helpless and dependent character of a large proportion of its suitors. Its business is so large and many of the questions involved so difficult and complicated that undue indulgence to some, means deprivation to others. This petition for rehearing is neither in form nor substance within the rule. Complaint is made that Mr. Lindsay was charged with having received dividends on his stock, when in point of fact he had never received one cent. Counsel on the argument of the exceptions was unable to point out, and the court has no recollection of, such evidence. But assuming this finding an error, it is not a sufficient ground of review; for it was treated by the court, not as

material to the decision of the main issue, but as an aggravating circumstance. There is no allegation of new or after-discovered matter which could not have been used before the decree was made; but a disingenuous statement that the averments of the petition "were not all known" at the former hearing. There is not even an allegation that those which were unknown were material, or that any effort had been made to complete the proof. In the absence of averments to the contrary, it must be assumed that at the time of the former hearings petitioner had the same means of proving his claim which he now has. The answer asserts without denial that before the present proceeding was begun the administrator in response to a demand for payment of the subscription made a similar claim; counsel admitted that they knew of the existence of the claim; and yet notwithstanding two opportunities were afforded, the defense was placed upon technical rather than meritorious ground. There can be no doubt that counsel had ample time for examination and preparation, and that their choice of the line of defense was made with deliberation. They have themselves therefore alone to blame. A rehearing must subject the respondents to oppressive delay and additional expense without any default upon their part.

But even assuming the petition drawn in accordance with the rule governing rehearings, the claim as set forth is insufficient to sustain it, but falls within the principle that there can be no recovery upon a *quantum meruit* without a precedent contract authorized by the charter, for services rendered by a director or president of a corporation: *Martinsdale v. Wilson-Cass Company*, 134 Pa. 348. "We regard it as contrary to all sound policy," said the court in *Loan Association v. Steinmetz*, 29 Pa. 534, "to allow the director of a corporation elected to serve without compensation, recover for services performed by him in that capacity, or as incidental to his office. It would be a sad spectacle to see the managers of any corporation, ecclesiastical or lay, civil or eleemosynary, assembling together to parcel out among themselves the obligations or other property of the corporation in payment for their past services. At such conduct the Act of 25th of April, 1855, aimed a well-directed blow by making it punishable by indictment. The civil law, however, required not this support from the criminal statute. In *Collins v. Godfrey*, 1 Varn. & Ald. 956, a director of a bank was prevented from receiving a reward offered by the bank for the recovery of stolen property because he performed nothing but his duty in endeavoring to recover it. In

Dunston v. Imperial Gas Company, 3 Varn. & Ald. 135, a resolution formerly adopted allowing the directors certain compensation for attendance on courts, etc., was held insufficient to give a director the right to recover for such services. . . . Thus stands the law. We have no fear of practical inconvenience from it. If the services of the director become important to the corporation let him resign and enter its employment like any other man. If it be proper for directors generally to receive compensation, let it be so provided in the organic act which creates the body. Those who commit their money to its care will then do it with their eyes open. Until this be provided there is no reason in law or morals for allowing their property to be taken without their knowledge or consent." It is not alleged that in the present case there was any charter power to make the alleged contract. Counsel for petitioner admits the principle of these cases; but insists that an implied contract existed which brought this case within it.

Conceding an implication within the rule, the averments contained in the petition do not raise it. The first averment is a mere expression of expectation, the second, alleged declarations to unnamed individuals, neither which could be received as evidence of a contract with the bridge company. If a contract existed it must have been with the board of directors in its official capacity. There is no allegations of corporate actions; and the alleged approval of the claim by the individual members of the board could not be treated as an equivalent. The third averment implies not a claim of compensation for services rendered upon the strength of an antecedent contract; but made after the alleged services had been rendered. It amounts to a mere expression of notice of a claim; but not necessarily of precedent authority. An essential averment is therefore lacking.

To the item of claim for procurement of the passage of the Allegheny City ordinance, and of release of title, there are special objections. In respect of the first Mr. Lindsay's admitted position as president of council disqualified him from claiming compensation for any services rendered by him in that behalf; and in respect of the second, the bridge contractor had assumed the obligation of obtaining releases, and Mr. Lindsay must have looked to him for compensation.

It is clear from these considerations that the petitioner has no equity to relief.

For petitioner, *W. B. Rodgers* and *J. J. Miller*.

For the bridge company, *H. & G. C. Burgwin*.

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No. 49.

PITTSBURGH, PA., JUNE 30, 1897.

Supreme Court, Penn'a.

DANLEY v. DANLEY et al.

In an action on a note by a woman against the estate of her husband's father, her husband being one of the defendants in his capacity as one of the executors, it is competent for the plaintiff under the Act of May 23, 1887, to testify as to declarations of her husband corroborative of her claim that she never received any credits on the note in suit, she having first been called by the defendant as for cross-examination to show that a loan by her to a third person represented money paid on the note in suit.

A party complaining on appeal of the admission of evidence objected to in the court below will be limited to the specific objection made to it there.

Appeal of Henry P. Danley and John S. Danley, executors of the estate S. S. Danley, deceased, defendants, from the judgment of the Court of Common Pleas of Washington county, in an action of *assumpsit* brought by Elcie Danley on a promissory note executed by testator.

At the trial it appeared that the note sued upon was for \$640, and was dated July 26, 1875. The maker of the note, S. S. Danley, died in 1891, leaving two sons, H. P. Danley and John S. Danley, his executors and heirs at law. On July 1, 1895, this suit was brought to recover the amount of said note. Upon the trial of the case the plaintiff offered in evidence the note, the execution of which was not denied, and rested. The note had a number of credits indorsed on the back of it. The defendants called N. Pees, a justice of the peace, who testified that some time after the death of S. S. Danley the plaintiff left with him this note for the purpose of having him make a calculation as to the amount that was due her. He was not positive whether she or her son brought the note to him, but he testified that after he had made the calculation, deducting all of the credits that appeared on the back of the note, and ascertaining the balance due, she came to his house, and he showed her his calculation and explained it to her. She made no objection to the calculation which he had made on the ground that the credits were not valid, but took the calculation and went to the home of John S. Danley, one of the executors, and gave the calculation to his wife with the request that she tell her husband that she,

the plaintiff, wanted her money. This evidence was offered for the purpose of showing that the plaintiff had admitted the genuineness of the credits on the note. The plaintiff was called as a witness in her own behalf in rebuttal for the purpose of proving declarations made by her husband to her counsel in her presence, to the effect that he, H. P. Danley, had gotten the money and entered the credits on the back of the note, and that she, the plaintiff, had never gotten any of it. This testimony was objected to for the reason that the plaintiff was incompetent to testify to any declarations made by her husband. The objection was overruled and the testimony admitted. The admission of this testimony is the error assigned in this case.

For appellants, *R. W. Irwin*.

Contra, *M. L. A. & B. E. McCracken* and *J. McGiffin*.

Opinion by McCOLLUM, J. Filed January 4, 1897.

The only question raised on this appeal is whether the learned court below erred in allowing the plaintiff to testify to a declaration of her husband corroborative of her claim that she never received anything represented by the credits on the note in suit. The testimony was objected to on the ground that she was not competent to testify to any declaration made by her husband. Previous to the offer of the testimony the plaintiff had been compelled by the defendant to testify as if under cross-examination. The purpose of the cross-examination was to show by her that the loan to Montgomery in February, 1894, represented money paid on the note. The purpose was not accomplished, as she testified distinctly that the money so loaned was hers, and that it was not furnished or paid to her by her husband, or on account of the note. The cross-examination related to a transaction which occurred in the lifetime of the maker of the note, and clearly qualified the plaintiff to testify in the case "to all relevant matters." It is true that her husband, as executor of his father's estate, was a co-defendant in the action, and a participant in the demand for her cross-examination under the statute. But his position as executor did not add to or diminish his interest in the estate, nor change the relation of the suit to it. The plaintiff having been subjected to a cross-examination under the statute, was competent to testify as aforesaid, and her competency was not affected by the fact that her husband was an executor of the estate, and a defendant. After the cross-examination she testified in rebuttal, that the credits on the note were in the handwriting of

her husband; that she had never received any of the money indicated by the credits to have been paid upon the note; that she never authorized her husband to receive payments on the note, and that she did not know until she saw the credits that he had done so. This testimony, if believed by the jury, entitled the plaintiff to the verdict she obtained. It is now claimed, that conceding the competency of the plaintiff to testify as above stated, his declaration that she did not receive any of the money represented by the credits on the note was irrelevant. A sufficient answer to this claim is that it was not the ground of the objection made to the admission of the testimony. The objection to the offer of the evidence was that the wife was incompetent to testify against her husband. This is frankly conceded by the learned counsel for the appellants, but he suggests that inasmuch as he made, on the argument for a new trial, the same objection to the evidence that he now makes, we ought to consider it as made on the trial in the court below. It is well settled that the party complaining on appeal of the admission of evidence objected to in the court below, will be limited to the specific objection made to it there. Nothing appears in this case to justify us in departing from the established rule. The declaration testified to was comparatively unimportant, and there is no reason to believe that it had any influence in the decision of the case.

Judgment affirmed.

FRANCIS et ux. v. FRANKLIN TOWNSHIP.

Person who, while driving, was injured by being thrown over one of the wing approaches to a bridge which was not properly protected by guard rails, entered of record as a county bridge according to the 34th section of the Act of 1836, which it was the duty of the county to put in repair under the Act of April 13, 1843, cannot recover for the injury from the township in which the bridge was located for the injuries sustained. Under the Act of April 13, 1843, relating to the repairing of bridges at the expense of the county in which they are located, relieves the township of its common law and statutory duty to repair bridges and imposes it upon the county.

Appeal of Franklin Township, John A. Albert and Robert McGinnis, supervisors, defendants, from the judgment of the Court of Common Pleas of Butler county, in an action of trespass brought by H. J. Francis and wife to recover for personal injuries.

The facts sufficiently appear in the opinion of the Supreme Court.

Plaintiffs' second point and answer thereto were as follows:

"2. If the jury believe from the evidence that the township took charge of and worked the

public highway up to the end of the bridge, where the accident happened, and filled in the approach to said bridge and the approaches to other bridges which had been erected at the same place, and had general charge of the said road up to that bridge, continuously, for a period of thirty years or more, and the same being part of a public highway, it cannot shift the responsibility, and set up that the county is responsible for an accident that occurred at the side of the approach to said county bridge. *Answer:* That is affirmed." (First assignment of error.)

Defendants' points and answer thereto, among others, were as follows:

"3. If the jury find from the evidence that the county bridge in question should have been supplied with guard rails on the approaches thereto, in order to safe and convenient travel onto the same, and that no such guard rails were placed there at the time of its construction or afterward, in that event the absence of such guard rails was a defect in the original structure of the bridge which cannot be charged up against the defendant township, and the verdict of the jury must be for the defendants. *Answer:* Affirmed, unless the jury believe from the evidence that the township took charge of and made the fills and approaches to the bridge, and released it—the county—from this duty. If the supervisors took charge of and made the fills and approaches they were bound to make them reasonably safe for travellers, etc." (Second assignment of error.)

"4. The bridge in question was a county bridge and consisted not only of the structure spanning the stream, but also of the approaches and wing walls leading thereto, and the duty of building, repairing and maintaining the same in safe condition for public travel devolved upon Butler county by statutory enactment, and not upon the defendant township, and the verdict of the jury must be for the defendants. *Answer:* Affirmed, with the same qualification as in answer to third point." (Third assignment of error.)

"5. The filling of the approaches and providing of guard rails, if necessary, became the duty of the county, and if the supervisors or individuals did work on the bridge or its approaches, this would not, of itself, relieve the county, nor transfer to the township the duty of completing the bridge and its approaches, so as to be safe and convenient for public use. *Answer:* The county having built the bridge, it was its duty to build the approaches and make the fills and keep the same in ordinary, reasonably safe condition; but if the township assumed to take

charge of, and made the approaches and fills, and kept the road in repair up to the bridge for a period of over thirty years, then it relieved the county, and having undertaken to do this work, it was bound to do so in proper manner, so as to be in reasonably safe condition for public travel, and to continue to keep it in such condition." (Fourth assignment of error.)

"6. Under the evidence in this case the verdict must be for the defendants. *Answer: Refused.*" (Fifth assignment of error.)

Verdict and judgment for plaintiffs for \$2,300. Defendants appealed.

For appellant, *McJunkin & Galbreath and Thompson & Son.*

Contra, Ralston & Greer.

Opinion by DEAN, J. Filed January 4, 1897.

A county bridge, known as "Gallagher's Bridge," spans Muddy creek in Franklin township, Butler county. The bridge proper is fifty-nine feet long and twelve wide, with elevation above the water at ordinary stages of six to ten feet; wing walls for the approaches extended back from the shore abutments for a distance of fifteen to twenty feet, and were filled in between, almost to a level with the top of the walls, making the approach to the floor of the bridge, from the road, rise about nine feet in fifteen or twenty. The wing walls of the approaches were without sufficient guard rails or other barrier. The plaintiff, Mary Francis, with three members of her family, on 27th of February, 1895, in a one-horse sled, was driving on the highway to cross the bridge, when the horse became uncontrollable, ran away, jumped over one of the wing walls to the ice below, dragging the sled and occupants after him. Plaintiff was very seriously injured. Alleging negligence on part of the township in not erecting guard rails, she brought this suit for damages. There was evidence the horse was blind and unmanageable generally, and was on that day negligently harnessed and driven. Two questions therefore was submitted to the jury: (1) Were defendants negligent in not putting up guard rails? (2) Should contributory negligence be imputed to plaintiff? Both questions were answered in favor of plaintiff by the jury, who found a verdict for her of \$2,300 damages. A third question, one of law solely for the court, was raised, and decided against the defendants. It was this: In view of the fact that the bridge was a county bridge, was the township answerable for the character of the structure, or for neglect to keep it in repair? This question fully appears by defendants' fourth point, as follows: "The bridge in question was a county

bridge, and consisted not only of the structure spanning the stream, but also of the approaches and wing walls leading thereto, and the duty of building, repairing and maintaining the same in safe condition for public travel devolved upon Butler county by statutory enactment, and not upon the defendant township, and the verdict of the jury must be for the defendants."

Without at present noticing the evidence tending to show the township did work at times in repairing the bridge and approaches thereto, as if that were its duty, we will first consider the duty imposed by statute on the respective territorial subdivisions of the State, in reference to such bridge as this. The thirty-fourth section of the Act of 1836 enacts: "When a river, creek or rivulet over which it may be necessary to erect a bridge crosses a public road or highway, and the erecting of such bridge requires more expense than it is reasonable one or two adjoining townships should bear, the court . . . shall on petition . . . order a view in the manner provided for in the case of roads, and if on the report of viewers, it shall appear to the court, grand jury and commissioners of the county, that such bridge is necessary, and would be too expensive for such township . . . It shall be entered on the record as a county bridge."

By proper proceedings under this act, in 1869, this bridge was entered of record as a county bridge. The duty of construction and repair before that time, was unquestionably, on the township, and any damages from neglect of that duty was necessarily a township liability; nor was the township relieved from the duty of repairing such bridges until the passage of the Act of April 13, 1843, the first section of which declares: "It shall be the duty of the county commissioners of the several counties of this Commonwealth to repair all bridges erected by the county, and to pay the expenses of such repairs out of the county treasury in the usual manner." Then certain counties, of which Butler is not one, are excepted. The effect of these two statutes was to take from the township its common law and statutory duty to repair, and impose it on the county. The court below was of opinion the Act of 1843 did not relieve the township of its primary liability to repair, but that it still continued; and that the duty of the county to repair only made two municipalities answerable where before there was but one; and, further, that this being the case, plaintiff could at her election maintain her suit against either or both. We dissent from this construction. We are clear there was no legislative intention to impose upon the county and township exactly the same duty, involving the exer-

else of watchfulness and discretion on the part of both, and a joint or several responsibility for the consequence of neglect; a duty, too, affecting vitally the interests of the public, and which naturally would lead to confusion and cross purposes in performance, or, what is more probable, to neglect by both. Such a construction is repugnant to reason and opposed to public policy. Evidently, by the first act, the burden of erecting the new structure was imposed on the county, and, by the second, the burden of keeping it in repair. And it was wholly unnecessary by the use of negative words, in either case, to say the duty was no longer on the township. The affirmative language of both statutes import a complete legislative transfer of the duty from the one to the other. The cases cited by the learned judge of the court below are very far from supporting his conclusion. *Gates v. P. R. R. Co.*, 150 Pa. 50, was the case of a bridge built by the railroad company to supply a highway destroyed by the construction of its road-bed. Under the general railroad Act of 1849, the relative duties of townships and railroads with reference to such a matter are altogether different from those of a township and county under the Acts of 1836 and 1843, and such cases, therefore, furnish no analogy to help us out here. *Dalton v. Upper Tyrone Twp.*, 137 Pa. 18, was the case of a bridge supplied by a railroad company by contract. No question of the county's liability was raised. It was assumed the duty was on the township, and the question was whether there was sufficient evidence of negligence to submit to the jury. The proposition that where an injury is caused by the concurrent neglect of two or more, the injured party can sue all or either, needed no citation of authorities. That point is well settled. But to constitute concurrent negligence, each must fail in the performance of duty. Here, if the township owed no duty, it owed no damages because of neglect. We hold in this and all like cases under the general road law, it is the duty of the county under the Act of 1843 to keep in repair county bridges of record.

This accident, as the jury has found, was a consequence of insufficient guard rails on the wing walls of the approach or embankment to the bridge, and it is argued by appellees these formed no part of the bridge, but were a part of the roadway; therefore it was still the duty of the township to maintain and repair them. This was the view taken by the court below in *Penn Twp. v. Perry Co.*, 78 Pa. 457. But this court reversed the judgment, saying: "How can a bridge be said to be completed without the proper means of access? . . . The bridge

is incomplete until everything necessary for its proper use has been supplied, and every such necessary appliance is part of the bridge. When, therefore, the Act of Assembly directed the counties of Dauphin and Perry to build the bridge over the Juniata, it meant that these two counties, without the aid of the townships, should provide a safe and convenient passage or highway over that river, and not merely that they should set up a structure which the public could not reach." The question having thus been pointedly decided, is no longer open for argument.

There was evidence showing that at times the township did work on the approaches to the bridge; therefore it is argued it assumed the duty of repairing the wing walls, with all the consequences resulting from neglect. The conclusion does not follow from the fact. It was the duty of the county to build this bridge of which the wing walls were a part, and keep both in repair. This was a duty imposed by statute. No duty was by law thereafter on the township in the matter. The supervisors could not, without express statutory authority, assume the duty of another territorial subdivision of the State, and thereby impose liability for neglect of that duty on the township. They were elected to supervise and keep in the roads, highways and bridges of the township only to the law imposed that burden on the township. To this extent, and no further, was the township answerable for their neglect. In whatever work they did on this bridge, they must be regarded as mere agents of the county, whose duty it was to do the work. If they had undertaken to repair the embankment of a railroad through the township, and had negligently performed the work, the township would not have been answerable, because the officer was wholly outside the scope of his duty.

We are of opinion the learned judge was in error in not unqualifiedly affirming defendants' fourth point, and in not directing a verdict for defendants. Therefore the judgment is reversed.

Court of Common Pleas No. 2, ALLEGHENY COUNTY.

SEWICKLEY SCHOOL DISTRICT v. OSBURN SCHOOL DISTRICT.

The Act of Assembly approved July 2, 1895, P. L. 434, and entitled "An Act to amend section 1 of the Act of April 18, 1893, P. L. 23, entitled 'An Act relative to the admission and instruction of children of soldiers of the late war of the rebellion in the common schools of districts outside of those in which their parents,

guardians or others entitled to their custody may reside," is unconstitutional and void, coming within the inhibition of section 7, of Article III, of the Constitution, providing against class legislation.

No. 699 Jan. T., 1897. Case-stated for the opinion of the court in the nature of a special verdict.

Charles and Adda McConnell, children of Benjamin McConnell, who was a soldier in the service of the United States in the late war of the rebellion, of legal school age, being temporarily within the school district of Sewickley borough, applied for admission and instruction the same as resident children in the proper common school of said district, in accordance with the provisions of the Act of Assembly of July 2, 1895, P. L. 434. Said McConnell children came daily into said Sewickley district for five months for the purpose of attending said school, and received instruction the same as resident children of Sewickley district. The residence of the parents of said McConnell children was in the Osburn school district during the time their children attended said Sewickley school. Bills for their tuition, duly sworn to by the president and secretary of said Sewickley school district, were presented each month to the Osburn school district, but none of them were paid. Whereupon Sewickley school district and said Osburn school district presented a case-stated for the opinion of the court in the nature of a special verdict.

For plaintiff, *R. T. McCready*.

For defendant, *John R. Harbison*.

Opinion by EWING, P. J. Filed March 4, 1897.

And now, March 4, 1897, this cause came on to be heard on argument of counsel, and, upon consideration, the court being of opinion that the Act of Assembly on which the plaintiff relies to recover is unconstitutional and void, judgment is entered on the case-stated in favor of the defendant for costs.

PITTSBURGH & BIRMINGHAM TRACTION COMPANY v. SEIDELL.

Though a contract by a street car company by which it rents to another the privilege of placing in and upon its cars advertisements is not one incidental to its charter and the business for which it was incorporated, and hence *ultra vires*, yet if the person with whom the contract was made has received the benefits issuing from it he cannot defend, in an action by the company to recover under the contract, on the ground that it was *ultra vires*.

No. 486 Jan. T., 1895. Question of law reserved on special verdict for plaintiff.

Plaintiff, a street railway company operating in the city of Pittsburgh, entered into a contract

with the defendant, by which, in consideration of a yearly rental of \$5,000, defendant was allowed the privilege of placing in and upon the company's cars signs advertising the business of tradesmen. Defendant, after the plaintiff had permitted the use of its cars for several years for such advertising purposes, defaulted in the payment of rent, and accordingly *assumpsit* was brought to recover the balance due under the contract. The jury found for the plaintiff, subject to the question reserved by the court, whether or not the contract between the parties was beyond the charter powers of the plaintiff.

For plaintiff, *George C. Wilson* and *A. W. Duff*.

For defendant, *J. S. & E. G. Ferguson*.

Opinion by EWING, P. J. Filed January 30, 1896.

The plaintiff and the corporations of which it is lessee were each chartered as street railway companies for the special purpose of carrying passengers for hire over certain streets in the city of Pittsburgh, and for this purpose alone. They are public corporations in the sense of having public duties to perform. They have a practical monopoly of that business on these streets, and they have the right of way over ordinary travel on the streets.

They have undertaken to go into the business of advertising by leasing to the defendant, exclusively, space both inside and outside each of their cars for placing advertisements of such tradesmen, manufacturers and others for compensation. Is this business or contract *ultra vires*?

The plaintiff has not only a right to carry passengers, but it also has a right to do anything necessary for the convenient carrying out the purposes for which it was chartered and whatever is fairly incidental thereto. For instance, when the Birmingham Passenger Railway Company was chartered, horses were the motive-power to be used. This, of necessity, would require the purchase of horses, and incidentally the purchase of feed for the horses. Incidentally also the care and sale of the manure made would not be *ultra vires*. Anything reasonably necessary for the convenience and comfort of the passengers while *en route* would be within the power of the company.

We are unable to see how the business of advertising for pay comes within any of the rules given as to the powers of such a corporation. It is not necessary for carrying out any of the powers or the purposes for which these corporations were chartered, nor is it incidental thereto.

It is not conclusive to the comfort or safety of the passengers, or to their convenience, any more than would be the printing a newspaper or establishing a banking business.

It is urged that this occupying space inside or out with advertisements does not inconvenience the passengers nor injure the public. Perhaps not, even though it be a disregard of the good taste of passengers or public. The business, however, on some of the lines has been carried on to the extent of running cars wholly for advertising and not for passengers. This is but an exaggeration of the more modest action of the plaintiff.

We cannot concede the contention of plaintiff's counsel that the corporation can do whatever is not forbidden by its charter. We have no such corporations in this State.

We are of the opinion that the contract in this case was *ultra vires* on part of the plaintiff.

The second question is, does this relieve the defendant from payment according to his contract so far as he has received value by the execution of the contract?

Were this a proceeding by the attorney-general against the corporation, or a suit by the corporation against the defendant to recover for refusal on part of defendant to carry out his contract by occupying the space contracted for, or an action by defendant against the corporation, to recover damages for a refusal on its part to furnish the space contracted for, a different question would arise.

The defendant having received the benefits of the contract, executed on both sides except the payment of the consideration on his part, cannot defend on the ground of *ultra vires* on part of the plaintiff.

The general rule is laid down in Thompson on the Law of Corporations, section 6021, as follows: "Modern decisions make the estoppel reciprocal, and hold that when the corporation is plaintiff in the action and is seeking to enforce a contract into which it has no power to enter, if the defendant has received the benefit of the contract, he will not be allowed to defend on the ground that it was *ultra vires*, at least until he restore the benefits which he received thereunder." The authorities cited by the author sustain the position. To the same effect is the case of *Oil Creek & Allegheny River R. R. Co. v. Penna. Transportation Co.*, 83 Pa. 160.

We are therefore of the opinion that the plaintiff is entitled to judgment on the verdict.

And now, January 30, 1896, after argument and upon consideration, it is ordered that, upon payment of the verdict, judgment be entered on the verdict in favor of the plaintiff.

AN ACT

Regulating the Practice, Bail, Costs and Fees on Appeals to the Supreme Court and Superior Court.

The following Act was approved May 19, 1897, and is to go into effect July 1, 1897, and shall apply to cases then pending:

SECTION 1. Be it enacted, etc., That in every case in which an appeal is taken to the Supreme Court or Superior Court, such appeal shall be entered in the court to which the appeal is taken, and filed with the same shall be an affidavit of the parties appellant, or some one of them, or of one of their chief officers, or of their agent or attorney, that said appeal is not taken for the purpose of delay, but because appellants believe they have suffered injustice by the sentence, order, judgment or decree from which they appeal. Such affidavit may be made before any one authorized to administer oaths.

SEC. 2. When an appeal has been entered, the prothonotary of the appellate court shall issue a writ in the nature of a writ of *certiorari*, directed to the court from which the appeal is taken, requiring said court to send to the appellate court for review the record in the cause or matter wherein is entered the sentence, order, judgment or decree appealed from, on or before the Saturday prior to the first day of the week fixed by the appellate court for the argument of said appeal; and no appeal shall be considered perfected until such writ be filed in the court below. The appellate court may by rule or special order, without prior notice to the court below, require said record to be prepared, certified and forwarded by the court below at an earlier date than that mentioned in the writ, whenever the record may be needed in any matter connected with said appeal. The prothonotary or clerk shall prepare and forward the record to the appellate court, duly certified by any judge of the court below, on or before the date mentioned in said writ or in such rule or special order.

SEC. 3. At the time of filing the appeal, the prothonotary of the appellate court shall be paid the sum of \$12, which shall be in full for all his service upon any appeal taken thereto, including the preparation and certifying the *remittitur* and record to the court below with a copy of the opinion in all cases, or for preparing and certifying the record to the Supreme Court in case of an appeal thereto from the Superior Court. No State tax shall be allowed on any appeal to the Supreme Court or Superior Court, or on any writ or process of either of said courts.

SEC. 4. No appeal shall be allowed in any

case, unless taken within six calendar months from the entry of the sentence, order, judgment or decree appealed from; nor shall an appeal supersede an execution issued or distribution ordered, unless taken and perfected and bail entered in the manner herein prescribed within three weeks from such entry. An appeal from the Superior Court to the Supreme Court must be taken and perfected within three calendar months from the entry of the order, judgment or decree of the Superior Court. Appeals taken after the times herein provided for shall be quashed, on motion: Provided, that in civil cases in which the right of appeal to the Superior Court has now expired, an appeal may be taken and perfected within three months after this act goes into effect.

SEC. 5. Bail upon any appeal shall be entered in the court from which the appeal is taken, shall be in the name of the Commonwealth to the use of all parties interested, and shall be sued upon in like manner as official bonds. Except as herein otherwise provided and subject to revision by the court from which the appeal is taken, the prothonotary or clerk thereof shall fix the amount of bail and approve or reject the security offered. For all services in connection with any appeal he shall receive the sum of \$3.

SEC. 6. An appeal from an order, judgment or decree directing the payment of money shall operate as a *supersedeas* if the appellant gives bond, with sufficient surety or sureties, in double the amount of said order, judgment or decree and all costs accrued and likely to accrue, conditioned that the appeal be prosecuted with effect, and that the appellant will pay all costs and damages awarded by the appellate court or legally chargeable against him.

SEC. 7. An appeal from an order or decree directing the assignment or delivery of any kind of personal property shall operate as a *supersedeas* if the appellant brings the article required to be assigned or delivered into the court below and gives bond, with sufficient surety or sureties, in double the amount of all costs accrued and likely to accrue, or gives bond, with sufficient surety or sureties, in at least double the value thereof as found by said court and the amount of said costs, and conditioned, in either event, that the appeal be prosecuted with effect, that the appellant will abide by and obey the order or decree of the appellate court, and will pay all costs and damages awarded by the appellate court or legally chargeable against him.

SEC. 8. An appeal from an order or decree directing the execution of any conveyance or other instrument by any party shall operate as

a *supersedeas* if the appellant executes the conveyance or instrument directed and deposits the same in the court below, and gives bond, with sufficient surety or sureties, in double the amount of all costs accrued or likely to accrue, conditioned that the appeal be prosecuted with effect, that the appellant will abide by and obey the order or decree of the appellate court, and will pay all costs and damages awarded by the appellate court or legally chargeable against him.

SEC. 9. An appeal from an order or decree granting an injunction or relief in the nature thereof shall operate as a *supersedeas* if the appellant gives bond, with sufficient surety or sureties, in such sum as the court below shall direct, conditioned that the appeal be prosecuted with effect, that the appellant will pay all costs accrued and likely to accrue, and will pay all damages and injuries suffered by appellees from the time of decree entered until final compliance with the order or decree entered on the appeal; but the court below may, notwithstanding the appeal, make such order or decree as may be necessary to preserve the *status quo* pending the determination of the appeal.

SEC. 10. An appeal in an action of ejectment, or other action involving the title to or possession of real property, when the judgment below is against the party in possession, shall operate as a *supersedeas* if the appellant gives bond, with sufficient surety or sureties, in double the sum he will probably have to pay in case the judgment be affirmed, conditioned that the appeal be prosecuted with effect, that the appellant will not commit or suffer to be committed any waste on the property in dispute, that he will pay whatever mesne profits accruing after the judgment shall be thereafter recovered against him, and all costs and damages awarded by the appellate court or legally chargeable against him.

SEC. 11. An appeal from an order or decree dismissing or removing any person acting in any fiduciary capacity whatsoever shall operate as a *supersedeas*, if the appellant deposits in the court below all the assets of the estate as found by the court below are or should be in his hands, and gives bond with sufficient surety or sureties in double the amount of the costs accrued and likely to accrue, or gives bond with sufficient surety or sureties in at least double the total undeposited assets of the estate as determined by the court below, and all said costs, and conditioned in either event that the appeal be prosecuted with effect, and that the appellant will pay such sum as shall be found to be due to the estate by such fiduciary, and all costs and dam-

ages awarded by the appellate court or legally chargeable against him.

SEC. 12. In appeals from judgments and decrees in *mandamus*, *quo warranto*, contested election cases, from sentences in criminal proceedings, and all other classes of cases not herein otherwise provided for, the appeal shall not operate as a *supersedeas* unless so ordered by the court below or the appellate court, or any judge thereof, either by general rule or special order, and upon such terms as may be required by the court or judge granting the order of *supersedeas*.

SEC. 13. An appeal from an order, judgment or decree for costs only shall operate as a *supersedeas* if the appellant gives bond with sufficient surety or sureties in double the amount of all costs accrued and likely to accrue, conditioned that the appeal be prosecuted with effect, and that the appellant will pay all costs and damages awarded by the appellate court or legally chargeable against him.

SEC. 14. An appeal from an order, judgment or decree which comes within more than one of the classes of cases above referred to shall not operate as a *supersedeas*, unless the bond with sufficient surety or sureties be in such amount and with such conditions as shall adequately secure the appellees in accordance with the provisions made for all the classes within which the order, judgment or decree comes.

SEC. 15. Appeals may be taken from any sentence, order, judgment or decree without security in any proceeding where by law the same is or may be allowed; but in such cases the appeal shall not operate as a *supersedeas*, except when a county, township or municipal corporation, or any one suing or defending in a representative capacity, is the appellant, or when the appeal is from a judgment entered in favor of the Commonwealth upon an account settled by the Auditor-General and State Treasurer, and a bond with approved security has already been given as required by law, or in any other case where a bond with approved security has already been entered in the court from which the appeal is taken, conditioned as herein provided for such appeal, in which cases the appeal shall operate as a *supersedeas* without security and except also that in all other cases where a corporation other than a county, township or municipal corporation appeals on its own behalf, such appeal shall be quashed unless bail is given, to operate as a *supersedeas*, as by this act required.

SEC. 16. Nothing herein contained shall operate to hinder the court below in its discretion from directing and enforcing the sale of any

property that may be perishable, notwithstanding an appeal, the fund realized to be brought into court pending the appeal, nor to hinder the court below from proceeding with the cause appealed from in anything not affected by the subject-matter of the appeal. Nor shall an appeal postpone payment in accordance with the final confirmation of any account, adjudication, distribution, report or award of damages by a jury of view, except to the extent necessary to preserve the rights of the appellant, unless specially so ordered by the court below or by the appellate court, or by any judge thereof.

SEC. 17. The court from which an appeal is taken may make such orders as to right and justice shall belong relative to the security offered or entered, either as to approval thereof, addition thereto, or substitution therefor, whenever a proper case shall be made to appear requiring the action of said court.

SEC. 18. Writs may be issued out of the Supreme Court or Superior Court, as heretofore, if the court below fails or neglects to certify or send the whole record in the cause, or when the record has been returned to the lower court and is needed for further proceedings in the appellate court. For all services in connection with said writs, or with any other special writs issued in appealed cases, the prothonotary of the appellate court shall be paid, at the time the writ is issued, the sum of \$3, which shall, in the discretion of the appellate court, be ultimately paid by the party suing out the writ, or as costs in the cause. A like sum shall be paid the Prothonotary of the Supreme Court on filing a petition for the allowance of an appeal from the Superior Court; but it shall, however, form part of the prothonotary's costs on the appeal if the petition is granted.

SEC. 19. No additional bail bond shall be required on appeals from the Superior Court to the Supreme Court, unless upon application of a party in interest it shall be made to appear to the Supreme Court that the bail entered is from any cause insufficient, in which event the Supreme Court may require additional bail to be entered in the court from which the appeal was first taken, and in default of the entry thereof within the time specified may order a *non pros.*; or in case the order, judgment or decree of the court below is reversed by the Supreme Court and final judgment entered for the appellant, in which event, in order to operate as a *supersedeas*, an appeal bond must be entered in the court from which the appeal was first taken, in such amount and with such conditions as are required in cases of appeals from similar orders, judgments or decrees of such lower court.

SEC. 20. At the expiration of ten days from the final decision of any cause by the Supreme Court or Superior Court, the prothonotary thereof shall send back the record with a *remittitur* and a copy of the opinion to the court from which it originally came, unless other steps be taken in the cause which shall require its detention. It shall not be necessary to return the record to the Superior Court in any case appealed therefrom, unless the Supreme Court shall so direct; but it shall be remitted to the court from which it originally came, in the same manner and with like effect as if directly appealed to the Supreme Court therefrom.

SEC. 21. The costs in any appealed cause shall consist of the amount paid the prothonotary or clerk of the court below and of the appellate courts, an attorney fee of \$3 in each court to which an appeal is taken. Such costs shall be paid by the party finally losing the cause, except as herein otherwise provided and in equitable proceedings where the court shall otherwise direct. In all cases where the appellate court shall be of opinion that the appeal was sued out merely for delay, it shall award as further costs an additional attorney fees of \$25, and damages at the rate of 6 per centum per annum, in addition to legal interest.

SEC. 22. The following Acts of Assembly, and parts of acts, viz.:

Section 14 of the Act of May 22, 1722, entitled "An Act for establishing courts of judicature in the province:" 1 Sm. Laws, 131.

Section 20 of the Act of April 13, 1791, entitled "An Act to establish the judicial courts of this Commonwealth in conformity to the alterations and amendments in the Constitution:" 3 Sm. Laws, 28.

Section 7 of the Act of March 11, 1809, entitled "A further supplement to an act entitled 'An Act to alter the judiciary system of this Commonwealth'" (5 Sm. Laws, 15), and so much of section 6 of said act as provides for appeals and writs of error and the affidavit required thereto.

Section 4 of the Act of March 22, 1817, entitled "An Act relative to suits brought by or against corporations:" 6 Sm. Laws, 438.

The Act of February 8, 1819, entitled "An Act to limit the time of appeal in cases of divorce, and of the settlement of the accounts of guardians, executors and administrators:" 7 Sm. Laws, 161.

So much of section 1 of the Act of April 6, 1830, entitled "An Act for the levy and collection of taxes upon proceedings in court, and in the offices of register and recorder, and for other purposes" (P. L. 272), as provides as follows:

"The Prothonotary of the Supreme Court, exercising appellate jurisdiction, shall demand and receive, on every writ of error issued or appeal entered by him, the sum of \$3.50."

The first proviso to section 59 of the Act of March 29, 1832, entitled "An Act relating to Orphans' Courts:" P. L. 190.

Section 3 of the Act of June 11, 1832, entitled "A supplement to an act entitled 'An Act concerning the administration of justice:'" P. L. 611.

So much of section 2 of the Act of March 27, 1833, entitled "An Act to facilitate appeals by guardians from the judgments of justices of the peace, and from awards of arbitrators and for other purposes" (P. L. 99), as relates to appeals to the Supreme Court.

The Act of March 11, 1834, entitled "A further supplement to the 'act to alter the judiciary system of this Commonwealth:'" P. L. 125.

Sections 7, 8 and 91 of the Act of June 16, 1836, entitled "An act relating to executions:" P. L. 755.

Section 11 of the Act of June 16, 1836, entitled "An Act relating to the jurisdiction and powers of courts" (P. L. 784), and so much of section 7 of said act as relates to writs of error.

So much of section 10 of the Act of June 13, 1840, entitled "A further supplement to an act entitled 'An Act providing for the election of aldermen and justices of the peace,' passed June 21, 1839, and for other purposes" (P. L. 589), as relates to appeals and writs of error to the Supreme Court.

Sections 1 and 2 of the Act of March 17, 1845, entitled "An Act to allow and regulate appeals to the Supreme Court for the Eastern District of Pennsylvania from the decrees in equity of the Court of Common Pleas of the county of Philadelphia:" P. L. 158.

So much of section 3 of the Act of April 21, 1846, entitled "An Act in relation to certain public officers and their sureties" (P. L. 432), as relates to the manner and terms upon which an appeal is to be allowed.

Section 1 of the Act of March 15, 1847, entitled "An Act to require corporations to give bail in certain cases, and relative to the commencement of suits against foreign corporations to the accounts of John Sloan, late Treasurer of Lycoming county and Pittsburgh and Connellsville Railroad Company:" P. L. 361.

So much of section 3 of the Act of March 21, 1849, entitled "An Act to facilitate the collection of debts against corporations" (P. L. 216), as relates to appeals and writs of error.

Section 29 of the Act of April 25, 1850, entitled "An Act relating to the bail of executrices to

partition in the Orphans' Court and Common Pleas to colored convicts in Philadelphia," etc. (P. L. 569), and the proviso to section 25 thereof.

So much of section 1 of the Act of February 14, 1857, entitled "An Act granting equity powers and jurisdictions to Courts of Common Pleas" (P. L. 39), as relates to the manner, terms and conditions for taking an appeal.

Section 59 of the Act of March 31, 1860, entitled "An Act to consolidate, revise and amend the laws of this Commonwealth relating to penal proceedings and pleadings" (P. L. 427), and the proviso to section 33 of said act.

The proviso to section 1 of the Act of March 16, 1868, entitled "An Act to authorize writs of error to the judgments of the Courts of Quarter Sessions on appeals from the orders of removal of paupers:" P. L. 46.

The Act of April 1, 1874, entitled "A supplement to 'An Act to establish the judicial courts of this Commonwealth in conformity to the alterations and amendments in the Constitution, passed April 13, 1791, limiting the time for taking writs of error, appeal and *certiorari* to the Supreme Court:" P. L. 50.

Section 8 of the Act of May 19, 1874, entitled "An Act relating to the organization and jurisdiction of the Orphans' Court, and to establish a separate Orphans' Court," etc., etc.: P. L. 206.

So much of the Act of May 19, 1874, entitled "An Act to provide for review in the Supreme Court in criminal cases" (P. L. 219), as requires the allowance of an appeal by the Supreme Court, or one of the judges thereof, in order to stay or delay execution of the sentence or judgment, or for an appeal by the Commonwealth in cases of nuisance, forcible entry and detainer or forcible detainer.

The Act of May 25, 1874, entitled "An Act to regulate damages pending a writ of error, and the costs accruing thereon:" P. L. 227.

The Act of March 24, 1877, entitled "An Act to prevent delay in the review of capital offenses in the Supreme Court:" P. L. 40.

The proviso to section 1 of the Act of April 4, 1877, entitled "An Act providing for appeals from the Court of Common Pleas in cases of applications for opening of judgments entered on warrants of attorney:" P. L. 53.

So much of the Act of June 11, 1891, entitled "An Act allowing and providing the manner of taking appeals in cases of divorce" (P. L. 295), as provides for the recognizance and affidavit on an appeal.

So much of section 4 of the Act of June 24, 1895, entitled "An Act to establish an intermediate court of appeal, regulating its constitution,

officers, jurisdiction, power, practice, and its relation to the Supreme Court," etc. (P. L. 212), as relates to the compensation of the prothonotaries of said court; so much of section 7, clauses (a) and (b), as requires the allowance of an appeal by one of the judges of the Superior Court in cases appealed from the Court of Quarter Sessions of the Peace and Court of Oyer and Terminer and General Jail Delivery; paragraphs 2, 3, 4, 5, 6 and 7 of section 8 of said act, and paragraphs 1 and 2 of section 9 of said act.

And all other acts and parts of acts, general, special or local, appertaining to the subject-matter covered by this act be and the same are hereby repealed, it being intended that this act shall apply to all appeals to the Supreme Court or Superior Court in any and every proceeding and from any court whatsoever, and shall furnish a complete and exclusive system in itself on all appeals to such appellate courts. But the power of said appellate courts, except in regard to the matters herein expressly provided for, shall remain unaffected hereby.

SEC. 23. This act shall go into effect July 1, 1897, and shall apply to cases then pending; but the limitation of time herein provided for as against any party entitled to appeal from a sentence, order, judgment or decree theretofore entered shall not begin to run until that date, if, but for this act, the right of appeal would have extended after that date beyond the times herein prescribed.

BOOK NOTICE.

THE FEDERAL COURTS. Their Organization, Jurisdiction and Procedure. By CHARLES H. SIMONTON, U. S. Circuit Judge. Richmond, Va.: B. F. JOHNSTON PUBLISHING COMPANY.

This work of one hundred and fifteen pages contains the lectures delivered by the author before the students of the Richmond Law School of Richmond College, Virginia.

To students of the law it is a valuable work, as it gives the law covering the practice and jurisdiction of the Federal Courts in a manner which is interesting and instructive, citing and explaining at the same time the important decisions of the Supreme Court which bear on the questions under discussion. Lawyers also not thoroughly acquainted with Practice in the United States Courts will be interested in reading it as it is the most valuable work for its size on this subject which has come to the writer's notice. The author's manner of setting forth the points decided in citing cases is especially clear, the citation of cases being quite extensive.

The reading of this work will repay lawyer as well as the law student.

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Supreme Court, Penn'a.

FRITZ et al. v. MENGES.

A man and his wife by written agreement let to the defendant his farm upon certain conditions as to the payment of taxes, the use of farming implements, etc., and further provided that if the defendant should comply strictly with the terms of the agreement, and also at the request of the husband and wife "do such work as shall be necessary to be done for them, such as furnishing fuel and providing for provisions and nurses and care for them in case of sickness, then the said John Geiger and wife hereby grant to him [the defendant] one day after my and my wife's death the tract of land described in Part First of this agreement, his heirs and assigns forever, and free of all encumbrances." Shortly after the execution of the paper defendant entered into possession and remained in possession until after the death of husband and wife. There was no evidence that the terms of the agreement were not complied with by the defendant. In an action of ejectment for the land by collateral heirs, *held*, that the agreement was not a lease but a present grant, containing words of inheritance, with conditions attached which were performed by the grantee who took an estate in fee.

The agreement in this case was an executed one and not executory.

In such a case it is not error to permit defendant to prove performance by him of all the terms and conditions of the contract under which he acquired title and retained possession of the land.

Appeal of Hannah Fritz and others, plaintiffs, from the judgment of the Court of Common Pleas of Somerset county, in an action of ejectment brought against Thomas A. Menges to recover a tract of land containing over 200 acres.

At the trial it appeared that both plaintiffs and defendant claimed title under John Geiger, who was the undisputed owner of the land on and prior to December 15, 1888. John Geiger died on March 17, 1890, intestate, leaving to survive him a widow and collateral heirs, the plaintiffs in this case. The widow died on January 31, 1893.

The defendant claims title by virtue of an article of agreement made with John Geiger on the 15th day of December, 1888, which is as follows:

This article of agreement, made and entered into this 15th day of December, A. D. 1888, by and between John Geiger, of Allegheny township, Somerset county, Pa.,

of the one part, and Thomas A. Menges, of Summit township, same county and State, of the other part, to wit:

Part First.—The said John Geiger doth hereby covenant and agree to let unto the said Thomas A. Menges all that farm or tract of land which he now occupies, situated in the township of Allegheny, county of Somerset and State of Penna., adjoining lands of Sturtz Bros., Jacob Troutman, U. Poorbaugh and others, containing about 200 acres, on the following conditions: The said John Geiger agrees to furnish one-half of all grain used and needed for seeding, and one-half of all farming implements to be used in cultivating said farm, and the use of one horse and feed for same, and to allow and grant unto the said Thomas A. Menges to receive one-half of all the proceeds raised on said farm; also to pay one-half of all the taxes to be levied and assessed on the farm from year to year, and the said Thomas A. Menges is to find one-half of all in comparison as above mentioned, and to pay the other half of all taxes, also to perform all the work necessary to be done and connected with and about the farm, and to keep all fences on the premises in good repair, and everything generally on the premises in good condition; also reserves the right of cutting any timber except such as shall or may be needed in and about the premises, fencing, fuel, etc. This agreement to take effect April 1, 1889, for a term as set forth in Part Second of this agreement. In consideration whereof the said Thomas A. Menges doth hereby promise and agree with the said John Geiger to comply with each and every act and condition as above mentioned.

Part Second.—The said John Geiger (and Elizabeth his wife) doth hereby further agree to and with the said Thomas A. Menges that if the said Thomas A. Menges shall and will from time to time strictly comply with the conditions of the agreements as above stipulated, and in addition, at the request of the (said) John Geiger and Elizabeth his (wife), do such work as shall be necessary to be done for them, such as furnishing fuel and providing for provisions and nurses and care for them in case of sickness, (then) I (the said John Geiger and wife do) hereby grant to him (the said Thomas A. Menges) one day after my and my wife's death the farm or tract of land as described in Part First of this agreement, his heirs and assigns forever, and free of all encumbrances.

The contention in this case arises chiefly on the construction of that article of agreement, the defendant claiming that this paper conveys an absolute title in fee-simple, and the plaintiffs claiming that no title was conveyed thereby and that it was only an agreement relating to tenancy, and that the question of conveyance was left entirely optional with John Geiger.

The paper was written and signed by John Geiger and Thomas A. Menges on the day of its date, and was intended to have been signed by the wife of John Geiger and a place was left at the close for her signature, but she did not sign the paper until sometime after the death of John Geiger.

At the time the agreement was entered into, Geiger and his wife were living on the farm, and they continued to reside thereon during the remainder of their lives. Geiger supported himself and family out of his share of the pro-

ducts of the farm while Menges was a tenant, living in another house.

The defendant undertook to show that he had made improvements on the farm, but plaintiffs contend that these improvements were all made by him as tenant under Geiger, with the possible exception of the spring-house, which was built during the first year of the tenancy of Menges. It was shown that other persons worked at this building besides the defendant, and there was no proof to show who paid them for that work. Plaintiffs' contention with regard to this feature is that whatever work was done by Thomas A. Menges, not included under the terms of the tenancy, was paid for by John Geiger during his lifetime.

There was no dispute about the facts, and the court directed a verdict for the plaintiffs subject to his opinion on a question of law reserved, and subsequently entered judgment in favor of the defendant on the reserved point.

Errors assigned were, *inter alia*, entry of judgment for the defendant.

For appellant, *J. L. Pugh and Coffroth & Ruppel*.

Contra, Valentine Hay and Koontz & Ogle.

Opinion by STERRETT, C. J. Filed January 4, 1897.

In the language of plaintiffs' only point, the learned trial judge instructed the jury that, "under all the evidence in the case the verdict must be for the plaintiffs for the land in dispute;" and accordingly a verdict was taken, subject to the opinion of the court on the question of law presented by said point. The defendant alone excepted to this ruling; but, inasmuch as judgment *non obstante veredicto* was subsequently entered in his favor on the question reserved, he of course abandoned his exception; and no question, as to the form of the reservation, has been raised here, by either party.

Waiving any question as to the regularity of the reservation, and considering the case, as the parties have done, on its merits, we are by no means convinced that the learned judge's construction of the instrument, upon which defendant's claim of title in himself depends, is not substantially correct. On the contrary, for reasons given in the opinion of the learned judge, we think the instrument in question was correctly construed.

There is no valid ground on which it can be successfully contended that the instrument in question is neither an executed nor an executory contract, but simply a lease. If that portion of it designated as "Part First" stood alone, and

contained no reference to "Part Second" and omitted the undertaking of the defendant, there might be some ground for construing it to be a lease. But in construing the paper both parts must be taken together; and when thus considered as a whole, it is very evident that it is not simply a lease.

With still less show of reason can it be considered *nudum pactum*. In the services to be rendered by the defendant, and which were actually performed by him, the agreement clearly discloses a valuable consideration.

Some of the authorities cited by plaintiffs in support of their further position, that at most the agreement is merely executory, are not in point. While the instruments to which they refer do contain words of present assurance of the land, they also provide for a future conveyance of the same. In the case at bar, there is a present grant of the land without any provision whatever for a future conveyance. The operative words are: "(then) I (the said John Geiger and wife do) hereby grant to him (the said Thomas A. Menges) one day after my and my wife's death the farm or tract of land described in Part First of this agreement, his heirs and assigns forever, and free of all encumbrances." We thus have a present grant—containing words of inheritance—on conditions to be performed by the grantee, followed by possession taken by him within less than three months after the execution of the instrument, and performance by him of the conditions and stipulations; and in addition thereto, valuable improvements made by him on the land, and continuous possession thereof during the joint lives of the grantor and his wife and the life of the survivor.

In *Gray v. Blanchard*, 1 Leading Cases, Am. Law of Real Prop. 127, it is said: "A condition may be made of anything that is not illegal or unreasonable, on the principle that the owner of the land, who is not obliged to transfer it at all, may attach to its transfer such conditions and restrictions as he pleases, and in view of which the grantee takes the land so long as they are not in contravention of any policy of law. . . . A very common condition in rural districts is that the grantee shall support the grantor during life." *Id.* 128, and cases there cited.

In the case before us, the conditions are: "Shall and will from time to time strictly comply with the conditions of the agreements as above stipulated, and in addition, at the request of said John Geiger and Elizabeth, his wife, do such work as shall be necessary to be done for them, such as furnishing fuel and providing for provisions and nurses for them in case of sickness," etc.

This language fully meets the requirements stated in *Gray v. Blanchard*, *supra*; and, in view of the undisputed facts that the defendant fully performed all the conditions and stipulations contained in the agreement, etc., and that no complaint was ever made by either the grantor or his wife, the title in fee, on the death of Geiger and his wife, became absolute in the defendant. As was held, in *Evenson v. Webster*, 44 Am. Rep. 802, "A conveyance upon condition subsequent, passes the title to the grantee, subject to be divested by failure to perform the conditions. The rule that the title passes in such conveyances is generally recognized: *Towle v. Remsen*, 70 N. Y. 303; 4 Kent's Com., 125; 2 Blackstone Com., 154."

Assuming for argument's sake merely that the contract is only executory, the question would then arise whether it is such a contract as a chancellor would enforce. We think it is, because (1) there is nothing unreasonable in its terms. It imposes on the defendant certain conditions, the performance of which on his part become absolutely necessary. (2) It contains words of inheritance which, in equity, are not even required in an executory contract. "An executory contract will pass a fee-simple in equity without words of inheritance:" *Ogden v. Brown*, 33 Pa. 247; *Phillips v. Swank*, 120 Id. 76. (3) There was full compliance by defendant with its terms and conditions, and no complaint to the contrary was ever made by either the grantor or his wife. (4) The contract is perfectly fair. While it is informal, its terms are sufficiently clear and capable of ascertainment. There is no allegation of fraud or imposition in its procurement.

Other authorities, among which are *Johnson v. McCue*, 34 Pa. 180, and *Dreisbach v. Serfass*, 126 Id. 32, are cited in support of the principle; but further elaboration of the subject is unnecessary. As already stated, the operative words of the contract under consideration—unqualified by anything therein contained—justified the conclusion that it was an executed contract and not an executory agreement to convey.

On the trial it was admitted that title to the land in controversy was in John Geiger prior to December 15, 1888, the date of the instrument referred to; that on March 17, 1890, John Geiger died intestate, leaving to survive him a widow, Elizabeth Geiger, and collateral heirs, but no lineal descendants, and that in January, 1893, the widow died. In same connection the plaintiffs proved that they are the heirs of John Geiger, and put in evidence the writ, etc.

To meet the *prima facie* case thus presented by the plaintiffs, the defendant proved that he

went into possession of the land under and in pursuance of said contract of December 15, 1888; that he complied with all the terms and conditions thereof, to be done, kept and performed by him, and that he has remained in possession ever since. After having proved the execution of said contract and the circumstances connected therewith, the instrument was offered and received in evidence. Its admission constitutes the first assignment of error.

There was no conflict of testimony as to the execution of the instrument, and there appears to have been no error in overruling plaintiffs' objection and admitting it in evidence.

Nor was there any error in receiving the testimony complained of in the second specification. It was both relevant and material in that it proved performance by the defendant of all the terms and conditions of the contract under which he acquired and retained possession of the land.

The testimony referred to in the third specification was rightly excluded, for the reason that it was incompetent and wholly irrelevant to the issue.

There was no error in the admission or rejection of testimony; nor was there any conflict of evidence as to any of the material facts in the case. We find nothing in the record that requires a reversal of the judgment for the defendant *non obstante veredicto*, and it is therefore affirmed.

McMAHAN v. SEWICKLEY MUTUAL FIRE INSURANCE COMPANY.

In an action upon a mutual fire insurance policy it is no defense to set up the existence of an unpaid assessment to work a forfeiture of the policy if it appear that by the charter of the defendant it was the duty of the insurance company, through certain of its officers, upon the refusal of any member to pay an assessment, to sue for such assessment, and if it shall remain unpaid for ninety days "after notice thereof," the policy of the insured shall be forfeited, when the defendant does not allege that any default was made by the plaintiff of an assessment "after notice thereof."

In such a case, after recovery by the plaintiff, any sum duly assessed by defendant against him should be deducted from the amount recovered.

Appeal of Thomas McMahan, plaintiff, from the judgment of the Court of Common Pleas of Westmoreland county, in an action of *assumpsit* brought against The Sewickley Mutual Fire Insurance Company to recover on a policy of fire insurance.

Thomas McMahan, the plaintiff in this case, was the owner of a two-storied frame dwelling house, situate in the township of Rostraver, in the county of Westmoreland, at the time of the

issuing of the policy of insurance by the company, and continued to own same to the date of the fire. The defendant was incorporated under the laws of the Commonwealth of Pennsylvania; November 10, 1881. On application and payment of all charges by plaintiff to the defendant company a policy of insurance was issued by them to defendant, McMahan, dated April 21, 1883, and mailed to his address, insuring a house and contents for \$2,000, the policy to continue in force for a period of ten years from date of issue. That on the 29th day of October, 1892, the house in the policy of insurance described was destroyed by fire, being a total loss. The defendant company was notified about the first day of November, 1892, in writing, of the fire and loss. The president, accompanied with three persons as adjusters, went on the premises of plaintiff to ascertain and determine the loss, and did adjust the loss sustained by the insured. The president asked for three months to pay the amount agreed upon. Plaintiff claims, *first*, that he paid all moneys that he was called upon or had received notice to pay to the defendant company. And the defendant does not contend that the plaintiff had received notice of any assessments. *Second*, that he, plaintiff, had never received any notice of the cancellation of the policy of insurance. The defendant company does not contend that they gave him notice of such cancellation.

At the expiration of the three months the defendant company denied any liability and set up as a defense, that the house insured was situate in Perry township, Fayette county, and not Rostraver township, Westmoreland county, Penn'a. Also, that the policy of insurance was cancelled in 1884, for non-payment of assessment. It was contended on the trial of the case: That this being a mutual company, and the plaintiff a member of same, that he was bound to go to the office and ascertain whether or not any assessments were issued or called, notwithstanding the fact that he did not receive any notice of same. The company failed to show that they had given plaintiff notice of any assessment or called upon him at any time for the payment of assessments or given him notice of the cancellation of policy of insurance.

Verdict was rendered in favor of defendant.

For appellant, *S. A. Kline*.

Contra, John S. Beacom and David L. Newill.

Opinion by STERRETT, C. J. Filed January 4, 1897.

While it may be conceded, as claimed by defendant, that the plaintiff must be presumed to have known the terms of the charter and by-

laws, it by no means follows that the mere existence of unpaid assessments worked a forfeiture of his membership in the insurance company. No duty was imposed on him to inquire, in the first instance, whether or not any assessments had been made. It would only have been after notice had been given by the executive officers whose peculiar function it was to assess and collect, that action on his part would have become imperative. This will appear from even a cursory reading of the charter. It expressly provides, in section 5, that when an assessment shall be made by the board of directors—the secretary shall place a duplicate in the hands of the collector, and, upon the refusal of any member to pay, the treasurer shall bring suit, and if such assessment remain unpaid for the space of ninety days “after notice thereof,” the policy of insurance or certificate of membership of such delinquent shall be forfeited. The whole burden of initiative is placed on the company officers; and their power to declare a forfeiture of membership is expressly made dependent on default in payment “after notice.” It is not alleged that any notice was given the plaintiff in this case of assessment against him until after suit brought. That being so, he was not bound to pay or tender payment of assessments of which he was not notified; and was therefore entitled to maintain an action for his loss under the terms of his policy, unless estopped by voluntary relinquishment of his membership, of which there was some evidence to go to the jury.

In his fourth prayer for instructions, plaintiff declares he “was ever ready and willing to pay any and all claims that might have been made or demanded of him” by the defendant company, etc. In view of this, it would be but just and equitable—in the event of a recovery—that the sum or sums duly assessed against him and remaining unpaid should be first deducted from the amount to which he may appear to be entitled.

The case lies in a very narrow compass and needs no further discussion.

Judgment reversed and a venire facias de novo awarded.

ZAHN et al. v. McMILLIN et al.

Defendant, a member of a partnership operating a gas well, negotiated a sale of the gas to R. for one-half the gross proceeds. This offer he concealed, and by means of fraudulent representations made by himself and his agent, that one-fourth of the net proceeds was the best price obtainable, secured from his co-partners a contract of sale at that price, in blank. In the contract he inserted his own and his agent's names, and immediately resold to R. in accordance with his offer. *Held*,

that defendant and his agent were jointly liable in equity to account to the other members of the partnership for the profits of the sale to R.

During the negotiations with the other members of the partnership, defendant's agent represented to them that he was interested with them as a partner, his conduct both before and during the negotiations being consistent with such claim. Held, that he was estopped to deny the relation in an action for an accounting.

Appeal of William A. Zahn and others, plaintiffs, from the decree of the Court of Common Pleas of Lawrence county, on bill in equity filed against E. A. McMillin and others for an account.

The facts sufficiently appear in the opinion of the Supreme Court, *infra*.

For appellants, *S. W. Dana, S. D. Long, A. Leo. Well and C. M. Thorp.*

Contra, J. Norman Martin, D. B. Kurtz and L. T. Kurtz.

Opinion by DEAN, J. Filed January 4, 1897.

On April 22, 1891, through negotiations conducted by E. A. McMillin, he and William Smith took by assignment from Thomas A. Book nineteen oil and gas leases in Lawrence county. The written assignment was to Smith, he to hold the same in trust, as follows: One-eleventh of three-fourths for McMillin, and ten-elevenths of three-fourths for such persons as should contribute toward the common enterprise and the cost of drilling two wells for the development of the common property for oil. Smith resided in Pittsburgh, and McMillin in New Castle; the last named, not far from the territory to be developed. It was alleged by plaintiffs that McMillin got his brother, J. M. McMillin, of New Castle, to join in the project. Smith induced a number of his friends in Pittsburgh to join as contributors, they to share in the profits in proportion to their contributions. From the money two wells were drilled, which developed as good gas producers, but no oil was struck. At the time he made the assignment to Smith, Book had reserved one-fourth the oil or gas to be developed, which was afterwards purchased by E. A. McMillin, plaintiffs alleged, for himself and brother. As to the three-fourths in name of Smith, he made a written declaration that he held the same in trust for himself, the McMillins, and the other contributors. The production of the wells indicated the property was valuable for gas purposes, and efforts were made by the parties to sell it at a profit. A committee, of which E. A. McMillin was one, was appointed to bring the property to notice of purchasers and conduct negotiations for a sale. Meetings were held in Pittsburgh, two of them at least attended by both the McMillins,

and others by E. A. McMillin alone. In January, 1893, both the brothers opened negotiations with O. C. Redic for purpose of selling the property to him. They discovered from him, in their conversations, that the salt water which was obstructing production in one of the wells, could be shut off at a small expense, and this would add largely to the value of the property. Full examination of the property by Redic resulted in an offer from him to take the gas, pipe it at his own expense to New Castle, sell it and pay to the owners one-half the gross proceeds of sales. Immediately after securing this offer E. A. McMillin, on January 17, 1893, wrote to W. A. Zahn, one of the co-owners, and one of these plaintiffs, at Pittsburgh, asking him if he could get the consent of the contributors to take one-fourth the net earnings, and pay one-fourth the cost of drilling new wells. In this letter he concealed from his co-owner Zahn, Redic's offer of one-half the gross proceeds of sales. Zahn replied that he thought he could get such consent. E. A. McMillin then went to Pittsburgh with a contract drawn, naming the Pittsburgh parties as the assignors and the two McMillins as the assignees. In this agreement it was set forth that all the parties were associated together as owners of the property, and it was stipulated the McMillins were to take the gas, pipe it to New Castle, and pay one-fourth the net proceeds to all the owners, including themselves, they to retain three-fourths. The Pittsburgh parties were urged to immediately execute the contract; but as one or more of them desired to consult counsel, its execution was deferred. They finally prepared another draft of a contract, embodying substantially the same terms, with the name of the purchasers left blank. This was executed January 31, 1893. As to this contract it is not disputed J. M. McMillin solicited plaintiffs to affix their signatures. No disclosure of the Redic offer was made to the Pittsburgh parties when they signed. After signature, the McMillins filed in the blank with their names as purchasers, and the same day contracted with Redic according to the terms of his proposition already noticed. He piped the gas to New Castle, and paid the McMillins one-half the gross proceeds of sales. About a year afterwards plaintiffs discovered the facts, and filed this bill against both the McMillins for an account, averring them to be joint owners or tenants in common with them of the leaseholds, and that a fraud had been practiced upon them in obtaining the contract of January 31, 1893. The defendants made answer, denying all the material averments of plaintiffs' bill. J. M. McMillin especially de-

nied having any interest in common with plaintiffs and his brother prior to the execution of the contract of January 31, 1893. The court below, after full hearing, dismissed the bill, and from that decree we have this appeal by plaintiffs. The principal errors alleged are the finding of fact, that J. M. McMillin was not interested in the original project, and conclusions of the court that he was not liable to account on the facts, even if his interest commenced at the date of the second purchase.

The court does not seem to question that on the evidence the bill could have been maintained if filed against E. A. McMillin alone, but being against the brothers jointly, and not sustained as to J. M. McMillin, it must be dismissed. The learned court below, in its opinion, speaks as follows:

"There are two main questions of fact upon which plaintiffs' claim for relief must ultimately rest: *First*, that J. M. McMillin had an interest in the leases mentioned in plaintiffs' bill, and was a tenant in common with plaintiffs in said leases on January 31, 1893; *second*, fraud, actual or constructive, on the part of the defendants in procuring from plaintiffs the contract Exhibit A. If either of these grounds fail, the case must fall. . . . An examination of the whole evidence fails to show the relationship of tenant in common between the plaintiffs and J. M. McMillin. We would hesitate to find such a relationship from the evidence of the plaintiffs if it was not contradicted. Both J. M. McMillin and E. A. McMillin, however, positively deny such relationship in their answer, and also upon the stand as witnesses, and their cross-examination by plaintiffs' counsel does not in the least weaken their evidence.

"The plaintiffs also contend that even if J. M. McMillin was not a co-tenant he occupied such a fiduciary relation toward them which required him to disclose the offer which Redic had made prior to January 31, 1893, and which offer was concluded in the contract of February 1, 1893. They urge that he had so conducted himself as to lead the plaintiffs to believe he was acting with them and for them. They also urge that he misrepresented the facts by stating that the terms of the contract he was obtaining from them were the best that could be obtained for the property.

"We have already found that J. M. McMillin was not a co-tenant with the plaintiffs and E. A. McMillin. We find nothing in the evidence which should have induced the plaintiffs to believe that he was a co-tenant, or that he was acting in any fiduciary capacity for them or with them. It is true that he was present at

two meetings of the parties in Pittsburgh, but there was no evidence to show that he took any part in the proceedings, or acted other than as a spectator. The value of the property was purely speculative, and the plaintiffs had the same opportunity to form an opinion as to its prospective value as J. M. McMillin. It is true Redic had proposed to him to lease the premises on more favorable terms than what the plaintiffs were to get by their contract, but there was no such fiduciary relation subsisting between J. M. McMillin and them as required him to disclose Redic's offer."

Whether a tenant in common or merely a partner in a project for gain, E. A. McMillin, on the undisputed facts, by reason of his confidential relation with his contributors to the common enterprise, perpetrated upon them a palpable fraud,—not a constructive fraud merely, but an actual fraud. If the brother aided and abetted him in consummating this fraud that they two might reap the fruits of it, and they have succeeded, they are jointly bound to make restitution.

On sufficient evidence the court below has found that J. M. McMillin had no interest in the purchase from Book, April 22, 1891. There was much evidence to the contrary, but the error is not so clearly manifest in the finding as to move us to disturb it. Therefore we assume as a fact his property interest dated from the contract of January 31, 1893. It is not denied—nor could it be, in the face of the evidence—that by that contract J. M. shares in the fruits of the fraud to which E. A. was an active party, and for which he is answerable in an account. But did J. M. by his declarations and conduct aid his brother in procuring the fraudulent contract so as to render him accountable in equity to these plaintiffs? The learned court below thinks not, because he was not one of the contributors to the first enterprise, and therefore must be treated as a stranger dealing at arm's length with the co-partners or co-tenants of his brother. This is a mistake, for that one fact warrants no such conclusion. If he had been a member of the first association, and had untruthfully represented a material fact to his associates to induce them to part with their interests, that would have been conclusive against him, because of the legal presumption of a confidential relation; but, if there was not presumptively a confidential relation, still was there one in fact, or such relation as warranted them in relying on the truthfulness of his statements? The principle controlling such cases, and deducible from all the authorities, is well stated by Perry on Trusts, vol. 1, p. 179:

"There are cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. . . . If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent. It is said that a party in such circumstances is bound to destroy the confidence reposed in him, or to state all the facts that such confidence demands."

The court's twelfth finding of fact is, that at the time the contract was entered into, J. M. McMillin represented to the Pittsburgh parties that the terms, one-fourth the oil, as embodied in the contract he was soliciting them to sign, were the best that could be got. This representation was willfully false. He admits that Redie had made an offer of double that price, which had been accepted by him and his brother, on which a contract had been framed, which he had in his pocket ready to be signed as soon as the Pittsburgh parties signed the contract for one-fourth. In whose interest was he acting when this falsehood was uttered? It is argued, his own expectant interest in the contract with the Pittsburgh parties. But he was also dealing as the agent of his brother. They two were the purchasers, parties of the second part to the contract which inured to the benefit of both. He was there to conduct the negotiations and close the contract in pursuance of his brother's letter to Zahn of ten days previous, which did not hint at Redie's offer. There can be no severance of the falsehood by imputing one-half of it to E. A., who held a legal, confidential relation, and the other half to J. M., who, if representing himself alone, did not hold the same relation. By taking his brother's place, and representing him, he spoke for both, and put himself in a position where the brother's co-tenants were justified in relying on this false statement of a most material fact. This gave him a vantage ground, which naturally invited confidence in his statements, and he must be held to the same rule of conduct as E. A. would have been held to had he, on the same representation, personally solicited the assent of his co-partners to a sale at half price. "It is naught, it is naught, saith the buyer; but when he is gone his way he boasteth himself." This is the attitude of a stranger toward the seller whose wares he deprecates, and the one the court below finds J. M. to have held. It is not the one the facts put

him in. To hold J. M. answerable, it is not essential that another case exactly like this on the facts should have been decided fraudulent. This, clearly, is within the scope of established principles, where in equity a party dare not falsely represent a material fact. "Courts have never laid down as a general proposition what [facts] shall constitute fraud, or any rule beyond which they will not go, lest other means of avoiding equity;" 2 Parsons on Contracts, 769. And they certainly have never held that where a party aiding in a fraud has not theretofore acquired a fractional interest in the property which is the subject of the fraudulent bargain, he cannot be called to an accounting.

But if he had no direct interest of his own, the representation went still further than as a representative of his brother; for the very agreement he had asked them to sign says: "Whereas, the said parties of the first part and of the second part are associated together as owners of leases for oil and gas purposes, on one thousand acres of land in Shenango and Slippery Rock township, Lawrence county, . . . the said first parties owning one hundred and twenty shares, and the said second parties owning fifty-six shares; and whereas, two wells have been drilled at the joint expense of all of said owners, . . . and whereas, all of said owners are desirous of having said gas used . . . so as to realize a profit . . ." True, this was not the agreement signed three days thereafter, but it was one E. A. McMillin had, acting for both, asked them to sign. E. A. was then acting for J. M. in efforts to secure a contract in which both concurred, and which was framed with a view to accepting the Redie proposition, and was therefore a false representation by both. It was not signed, only because the Pittsburgh parties desired their own counsel to frame it. The one adopted by the two brothers, and first exhibited to the Pittsburgh parties, contained a deliberate declaration in writing that J. M. McMillin was then a co-partner. This was a direct invitation to the co-partners to deal with them in securing the best price. The conduct of J. M. for months before, and during all the negotiations, seems to us, in this printed testimony, reconcilable only with the theory that he was interested in the leases at the date of the contract with the Pittsburgh parties. Assuming, however, that when he said on the witness stand he was not interested, he told the truth, he did not tell the truth to the confidants and partners of his brother when he contracted for himself and his brother at half price for their interests. The law cannot undertake to draw a line between his misrepresentation as agent

for E. A. and his misrepresentation in his own interest as a stranger to the original association. And if his declarations and conduct misled, as they plainly did, the Pittsburgh parties, and induced them to believe him interested with them in a common enterprise, he is estopped now from denying the truth of the representations. On both grounds the bill is sustained as against him, and both should account to plaintiffs as prayed for in the bill.

As to the remark of the court, that when the contract was made the value of the property was purely speculative, and all parties had the same opportunity for forming an opinion, it is certainly an error. The court must have overlooked the fact that J. M. McMillin had in his pocket, at the very time he was soliciting the signatures of the plaintiffs, the draft of the proposed agreement with Redic, which was to be signed as soon as the Pittsburgh parties had executed their contract, and which was afterwards on the same day actually executed by Redic. As concerned the McMillins, there was nothing speculative in their estimate of value. They knew exactly the worth of the property, by knowing what they were to get for it. Their profit depended only on how they could beat down the price by methods which some dealers call only shrewd, but which the law pronounces fraudulent, and holds the parties to a strict accountability.

It is ordered that the decree of the Common Pleas be reversed and plaintiffs' bill be reinstated, and further:

(1) That the said E. A. McMillin and J. M. McMillin were trustees *ex maleficio* for all the owners of said leaseholds in making said contract with Oliver C. Redic, and that said contract and all the rights of the first parties thereunder are the property of all the present owners of said leaseholds, to whom, through their treasurer, all payments under the same should be made.

(2) That the said E. A. McMillin and J. M. McMillin account to the orators for, and pay over to the said treasurer, all moneys received by them under said contract with Oliver C. Redic.

(3) That an injunction issue restraining the said E. A. and J. M. McMillin from selling, assigning, encumbering or in any manner disposing of said last-mentioned contract.

(4) That an injunction issue restraining the Big Meadow Gas Company from paying any further sum or sums of money to the said E. A. and J. M. McMillin under said last-mentioned contract.

It is further ordered that defendants pay the costs.

MCGOWAN v. BAILEY et al.

Act of 1833 gives to the widow of an intestate leaving issue one-third part of the realty for life. Act of April 25, 1850, provides that, when any coal mines are held by tenants in common, and coal is taken therefrom by one of the tenants, the others may sue for an accounting. *Held*, that the widow, in case coal is taken from the lands of her intestate husband by the purchaser from the heirs of their two-thirds interest, on accounting, is entitled to one-third of the value of the coal in place.

Where the purchaser is permitted by the widow to mine the coal for years without objection, and without asking for an accounting, she will be bound by a custom among coal operators that the owner shall not receive compensation for the slack, but only for lump coal.

Where the widow's possession of her intestate husband's land is undisturbed, the paper title, even of record, of a purchaser of the coal in the land from the heirs of intestate does not affect her right to her third interest therein.

Where the tenant in common mining coal in the common property retains for an unreasonable time the portion of the proceeds to which the other owner is entitled, he is liable for interest thereon after such time, though no demand was made by the latter.

Appeal of Julia Ann McGowan, plaintiff, from the decree of the Court of Common Pleas No. 1, of Allegheny county, on a bill in equity filed against Bailey, Wilson & Co. for an accounting as to coal mined.

The material portions of the master's report appear by the opinion of the Supreme Court.

For appellant, *Joseph Forsythe* and *J. S. & E. G. Ferguson*.

Contra, *J. McF. Carpenter*.

Opinion by DEAN, J. Filed January 4, 1897.

On August 12, 1863, John McGowan, of Millin township, Allegheny county, died intestate, leaving a widow, this plaintiff, and thirteen children. At his death he was the owner of, and resided with his family on, a farm of about sixty-six acres, more than half of which was underlaid with coal. After his death the widow continued to live on the farm down to the commencement of this suit. The other children conveyed their interests to their three brothers, James, John and William, who by deed of August 3, 1863, with clause of general warranty, conveyed by metes and bounds all the coal under forty acres to John O'Neil, and his title became vested in these defendants by deed October 28, 1880. At the date of John McGowan's death, there were two opened coal banks on the farm. In July, 1884, these defendants entered, put up valuable improvements, commenced mining and removing the coal and continued their operations down to the commencement of this suit. On October 20, 1893, the widow filed her bill against defendants, averring she was

entitled to her statutory dower of one-third of the rents and profits of the coal, and praying an account. Defendants by answer denied her right of dower in the coal, and averred she had received her dower and support from the surface of the farm; further, that she knew of the conveyance by her sons and of defendants' mining operations, yet prior to the suit, had made no demand for dower, nor had she offered to contribute any part of the expenses of mining. They further set up the plea of the statute of limitations. There were several pleas pertaining of the nature of demurrers, such as want of jurisdiction, nonjoinder of children of John McGowan, and nonjoinder of warrantors of title, which were properly overruled, and James F. Robb was appointed master to first determine from the facts and law whether plaintiff was entitled to an account. He reported she was, and a decree to that effect was made by the court below. Mr. Robb becoming ill, John D. Shafer, Esq., was appointed in his stead, and he proceeded with the hearing, and stated an account, showing a balance due plaintiff of \$4,900 with interest from date bill was filed. Both parties filed exceptions, which were overruled by the court and the report confirmed, and from that decree we have this appeal by plaintiff.

All of appellant's assignments of error bear upon two points, viz., the master's findings of fact as to quantity of coal mined, and his conclusion as to the basis of computation. Both, it is argued, are not warranted by the evidence or the law. The master's finding of quantity mined was as follows: Area mined, 85 acres; quantity per acre, 105,000 bushels; number of bushels lump coal mined, 3,675,000; slack coal mined, 40,000 bushels per acre; total slack, 1,400,000 bushels. The defendants having other banks on adjoining land from which they were mining coal, it was impossible for the master to ascertain the exact output from this land by inspection of shipping or sales books; but the cubic feet mined shows with proximate accuracy the quantity, and that method was adopted. The plaintiff claimed she was a tenant in dower, and was deforced of her dower by defendants, therefore they must account as trespassers.

It is not worth while to discuss the precise nature of the widow's interest in this farm of which her husband died seized, and of which there had been neither appraisement nor partition, and give to it a name capable of strict legal definition. The Act of Assembly of 1883 declares: "Where such intestate shall leave a widow and issue, the widow shall be entitled to one-third part of the real estate for the term of

her life." While it remains in this situation; no matter what the estate may be called after appraisement or partition, it is a freehold estate in the land, and this she enjoys in common with the children of her husband, whose interest is the remaining two-thirds. There is no hostility in the estates which gives the right of enjoyment to either to the exclusion of the other. The land descending from a common source, the intestate husband and father, the statute declares the quantum of the estate; and plainly intends it shall be enjoyed according to their respective interests; and unless there be actual deforcement, the turning out or exclusion of her who is in lawful possession, all she is entitled to is an account from the children. Unless there be a severance of the inheritance, she cannot treat her co-tenants as trespassers, merely because they have actively managed the common estate, and have received the whole of the rents or proceeds. These defendants being the grantees of the children, took precisely their place as co-tenants with the mother. And the evidence shows clearly all parties so understood it. The mining proceeded without a word of objection on her part until nearly all the coal was mined out. She did not then proceed against them as trespassers, but filed this bill for an account of her statutory thirds of the rents, issues and profits of which her co-tenants had received the whole. The bill, evidently, from the averments and prayer, was framed under the Act of April 25, 1850, which provides "that in all cases in which any coal or iron ore, mines or minerals have been or shall be held by two or more persons as tenants in common, and coal, iron ore, or other mineral has been or shall be taken from the same by any one or more of said tenants respectively, it shall be lawful for any one of said tenants in common to apply by bill or petition in equity to the Court of Common Pleas of the county in which the lands lie, praying that an account may be decreed and taken of all coal, iron ore, or other mineral taken by said tenants respectively; and said court shall thereupon proceed upon such bill or petition agreeably to the course of a court of chancery, and shall have full power to make all orders . . . that may appertain to justice and equity in the premises; and may cause to be ascertained the quantity and value of the coal, iron ore or other mineral so taken respectively by the respective parties, and the sum that may be justly and equitably due by, from and to them respectively, according to the respective portions and interests to which they may be respectively entitled in the lands."

Here both parties had an interest in the land,

the defendants being one of the tenants in common, and as is said by SHARSWOOD, J., in *Coleman's Appeal*, 62 Pa. 252: "A tenant in common exercises his undoubted right to take the common property, and he has no other means of obtaining his own just share than by taking at the same time the shares of companions. The value of the ore in place is therefore the only just basis of account." But as in the case before him, no evidence had been given as to the value of the ore in place, the finding of the master that the value of the ore at the mine's mouth, after deducting the expenses of putting it there, was adopted as an equitable basis on which to state the account.

The master in this case determined that plaintiff was entitled to one-third the value of the coal in place, and in this conclusion we concur. He further found that value was 40 cents per hundred bushels. The evidence before him justified the finding. He adopted as the quantity the number of bushels of lump coal, making no allowance for slack coal. He bases this finding on the evidence that what is universally understood in that coal region or neighborhood by bank leave or coal leave, is lump coal only, the slack being worth but little, is never accounted for by the operator, nor payment exacted for it by the owner; that it is considered a by-product, and goes with the lump coal sold. While we do not adopt this conclusion as a rule applicable to all cases of account between co-tenants of coal mines, we think no injustice was done by invoking it in this case. For years, plaintiff asked no account, nor made demand for her share. It is a fair presumption she did not intend to exact more than was paid by other owners of coal in that region. If she intended to make an unusual demand, she should have asserted it sooner.

As to the defendants' plea of the statute of limitations, it cannot prevail. True, the three sons conveyed to O'Neil, the predecessors of defendants in title, the coal without reservation of their mother's estate, in 1868, and the deed was put of record; but that was no assertion of a right hostile to her of which she was bound to take notice. As long as her possession was undisturbed, the paper title, even of record, did not impair her right, while the same possession, being in the direct line of their title, was notice to defendants, that as to her third, her claim was unequivocal and unabated. It was not until July, 1884, that defendants entered upon the land and commenced mining the coal. Being in the undisturbed possession, no right of action could accrue until her co-tenants' liability to account for her share of the coal began. By reason

of their relation in estate to her they had a right to mine and receive the money for all the coal, including her third. This was therefore not an act hostile to, or in denial of her right. As to her third, they were merely trustees for her, and, long before lapse of time raised a presumption of payment, she made a legal demand for an accounting. It has been held over and over again, since *Dillebaugh's Estate*, 4 W. 177, that the "statute of limitations in such case is out of the question." That the heir is a trustee as to her thirds; that an alienee of the land is in no better situation than the heir, and that even the taking of a recognizance or other security on the land in proceedings in partition to protect her interest, is merely a collateral security for her statutory estate. We are of the opinion the master's conclusion that plaintiff was entitled to one-third of 40 cents on every hundred bushels of lump coal removed, or \$4,900 was correct, but we do not concur in his finding that she was entitled to interest only from the commencement of the suit or filing of the bill. The master gives no reason except that she made no demand, for striking off the interest which is always computed on the balance due on an accounting, from the date it ought to have been paid. She was no more bound to demand, than they were to tender payment. They received the money of the common property, and as to the third of the value of the coal in place, were her bailiffs. The mean time, found by the master, during which defendants had plaintiff's money, was from July 1, 1890. This was an unjust detention, nearly three years longer than the master allowed, and from that date they should pay interest. Therefore the decree is affirmed with the modification that interest on the \$4,900, amount due, shall be paid from July 1, 1890, to date of this decree.

McGOWAN v. BAILEY et al.

Opinion by DEAN, J. Filed January 4, 1897.

This is an appeal by defendants from same decree as that appealed from by plaintiffs in No. 151 October Term, 1896, *ante*, p. 454, and in which opinion is handed down this day. In that opinion we have passed on all the questions raised by the assignments of error demanding notice in this case. The appeal is dismissed.

—Under a statute providing that an office shall be *ipso facto* vacant if the officer fails to file his bond within the time limited, it is held, in *State ex rel. Berge v. Lansing* (Neb.) 35 L. R. A. 124, that the provision is self-executing, and that such a vacancy can be filled without any previous judicial determination of the fact.

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No. 51.

PITTSBURGH, PA., JULY 14, 1897.

Supreme Court, Penn'a.

HASEL v. BEILSTEIN.

The plaintiff, an old illiterate German, not able to read or write English, and speaking and understanding it imperfectly, became very intimate with a younger German, the defendant, acquainted with English, who kept a store where plaintiff spent most of his time and put his papers, property, bank books, etc., in the defendant's hands for safe keeping, and sought his advice upon business matters. By a writing in the English language plaintiff subsequently gave his entire property to the defendant and his brother-in law. Held, upon bill in equity filed to recover the property, that the relation between plaintiff and defendant was of such a confidential nature that it was incumbent upon the donee to show that the gift was freely and voluntarily made with full knowledge of the nature of the act, and held further, that in this case the court was justified in finding that the transfer was to the defendant "in trust and confidence to keep for the plaintiff, subject to his demand."

Appeal of Herman Beilstein, defendant, from the decree of the Court of Common Pleas No. 1, of Allegheny county, on a bill in equity filed by John Hasel to compel a retransfer of certain personal property.

John Hasel was an aged German. He could write his name in English, but could read little or no English, and understood little of the spoken language. He was ignorant of business, but had accumulated some property. He had worked for John Schaber when able, and through him became acquainted with his brother-in law, Herman Beilstein, the appellant. He seems to have had confidence in and trusted the Germans, and believed them all good honest people.

He soon began to trust Beilstein, who exercised such an influence over him that he delivered his papers into his care and would transact no important business without him.

In the latter part of 1891, being unable to longer work, it was suggested to him that he go to the Soldiers' Home near Dayton, Ohio. It was further suggested that, as he could not care for his money, being old, and as Beilstein was already caring for and looking after his business, he should entrust his money and securities to the care of Beilstein and his brother-in-

law, John Schaber, Jr., who would return it when requested.

In order to carry into effect his intentions, on September 12th he gave to Beilstein a \$1,000 bill which he had just received from Falten Herbert. On October 26, 1891, he went with Beilstein and Schaber to the German National Bank in Allegheny and transferred \$2,155.34, on deposit there, to John Schaber, Jr.

On October 27, 1881, he went with Herman Beilstein to the Dollar Savings Bank in Pittsburgh and transferred to him the \$900 he had on deposit there. In neither of these transactions was there any money received by Hasel, and no money was taken from the bank. The next day, at Alderman A. J. Brinker's, a will was executed in the presence of both Beilstein and Schaber, in which they were made executors and sole beneficiaries, both to share equally of his property. Up to this time Schaber had received \$2,155.34 and Beilstein \$1,900.

Immediately after the will had been signed in the presence of Beilstein and Schaber, Beilstein and Hasel went to the recorder's office and the assignments of the three mortgages, amounting to \$4,700, was made to Herman Beilstein; this deprived plaintiff of his entire estate.

On October 31, 1891, he went to the Central National Military Home, Montgomery county, Ohio, and on the 5th or 6th of November was formally admitted, where he has been ever since.

In October, 1892, having become accustomed to his surroundings, on his first visit up from the Home, he requested the return of his property, but was put off. He decided that he might just as well leave it the way it was as to have the bother of it himself. The evidence discloses the fact that at this time Beilstein had opened an account with the old man, putting down the items of interest as received.

In May, 1895, that Hasel, upon demanding his money, was refused.

It was not until after the defendant had again twice been requested to turn over the property that the suit was brought in the court below, which resulted in a verdict for plaintiff.

For appellant, *A. H. & H. H. Rowand and James Fitzimmons.*

Contra, Samuel L. Dille and J. McF. Carpenter.

Opinion by MITCHELL, J. Filed January 4, 1897.

It may be seriously questioned whether the learned judge below did not state the law too broadly when he held the general rule to be

that whenever a person obtains by voluntary donation a large pecuniary benefit from another, he has the burden of proof to sustain the transaction. There is high English authority for such position, though Lord ROMILLY, in *Cooke v. Lamotte*, 15 Beavan, 234, cited by the judge below, adopts it with much reserve, but the American courts have not usually required such proof from the donee until he is put on the defensive by the appearance in the case of some indication of weakness of mind, undue influence, fraud, deception, confidential relation, or other element to render the transaction at least suspicious. See *Stepp v. Frampton*, ante, p. 432.

But it is not necessary to enter on this debatable ground, as the donee in the present case clearly stood in confidential relation to the donor. The latter was old and illiterate, a German not able to read or write English, and speaking and understanding it imperfectly. The appellant was a younger man, also a German, but carrying on business in the ordinary way in an English speaking community. An intimacy sprang up between the two, resulting in the plaintiff making appellant's store a place of daily resort, putting his papers and property, mortgages, bonds, bank books, etc., in the latter's hands for safe keeping, and seeking his advice upon business matters. When under such circumstances the plaintiff by writings in the English language divested himself of his entire property, handing over the larger part to the appellant, and the rest to appellant's brother-in-law, Schaber, even if it was a gift, the rule of equity in its least stringent form requires that the donee should show that it was freely and voluntarily made, with full knowledge of the nature of the act, and its effect upon the donor in relation to his estate. The decree of the court below could well be sustained on this ground alone.

But the learned judge goes farther and finds that it was not a gift at all, but a transfer "to the defendant in trust and confidence to keep for the plaintiff, subject to his demand." This is decisive of the whole case and renders superfluous any discussion of the assignments of error to subordinate findings of fact. It is argued for appellant that this conclusion is reached by the court below in disregard of the weight always given in equity to a responsive answer in denial. But the learned judge states expressly that he had given the appellant the benefit of that rule, and after an examination of the evidence we find no reason to differ with his conclusion. The testimony of the plaintiff himself is supported by that of Fallhaber, that appellant told him he only took care of the money and

exhibited a little book where he kept the account, "so that he could show it to the old man again." And the testimony of both receives strong corroboration from the circumstances of the case already noted.

The testimony objected to in the thirteenth to seventeenth assignments had some bearing on plaintiff's character and disposition with regard to money, and consequently on the probability of his comprehension of what he was doing, and whether he was imposed on. It was therefore admissible on the question of gift, but, as the court found there was no gift, it becomes of no importance at all.

Appellant charges that plaintiff divested himself of his property, in order to enter the Soldiers' Home, and thereby committed a fraud on the government, which will prevent a court of equity from aiding him. It is sufficient to say that the evidence of such intent is slight, and there is no evidence at all that his having or not having such an amount of property had any bearing on his admission to the Home.

Decree affirmed with costs.

O'TOOLE v. THE POST PRINTING & PUBLISHING COMPANY.

In an action for libel against a newspaper, a corporation, plaintiff, who went to the defendant company's office to demand a retraction, can testify to a conversation between her and an agent of the defendant, whose authority to speak for the defendant is not questioned, where the objection to the conversation, on the part of the defendant, was because the conversation took place three weeks after the publication, and hence was not part of the *res gestæ*.

Where there is an averment of special damages, plaintiff can testify to the manner in which the publication affected her where she was known, and that it prevented her from obtaining employment.

Where plaintiff testifies that defendant refused to retract if she intended bringing suit, which is denied by two of the members of defendant company who testify they offered to retract, it is not error for the court to pass without comment in the charge upon the effect of an offer of retraction when not asked by the defendant to say anything about it.

Appeal of The Post Printing and Publishing Company, defendant, from the judgment of the Court of Common Pleas No. 3, of Allegheny county, in action of trespass for libel brought by Mollie O'Toole.

While plaintiff was employed at an hotel as parlor maid, she received some attentions from a commercial traveller staying there temporarily. When he left for the East, she took the same train, for the purpose of making a visit at a relative's, with her parents' consent, and while there her father visited her. Defendant published an article in its newspaper, headed "Gone

to Her Drummer," "A Missing Hotel Maid being pursued by an Irate Parent," and containing a sensational account of plaintiff's alleged elopement with the commercial traveller.

The plaintiff having testified that after her return from her trip East, some three weeks after the publication, she went to the office of the Post Printing and Publishing Company and there saw a Mr. Barr, she then continued as follows: "Q. What did you say to him? A. Well, I asked him what authority had he to publish that lie in the paper."

To which defendant objected as follows: "We object to this. This is a suit against a corporation, and declarations after the fact are hardly competent. We object to any statements of agents or employees of the corporation sued, some weeks after the fact, and not as part of the *res gestæ*."

Objection overruled. Exception and bill sealed.

Thereupon the witness testified as follows: "Q. What did Mr. Barr say to you, and what was done at that interview? A. Well, he said he supposed they just did it for a mere joke, and I asked him if he would contradict it in the paper," and he said, 'No,' he wouldn't do that if I intended to bring suit against him. I told him I was not guilty of that, and he would have to account for it. I says, 'I'll show that it is not so.' He said, 'We won't retract if you intend to bring suit against us.'" (First assignment of error.)

"Q. Did the publications which have been read to the jury in your hearing have any effect upon your reputation in McKeesport or in other places where you have lived, and if so, what are they?"

Objected to. That is a question for the jury and not for the witness.

By the court: "Q. Did it have any effect at all? A. Yes, sir. Q. Then what was the effect? A. People had a bad opinion of me that read it in the papers. (Second assignment of error.) Q. Did you have conversation with any of your friends in relation to these articles? A. Yes, sir. Q. Did you talk to any people in McKeesport or Pittsburgh, or did any person talk to you about it?"

Objected to as irrelevant and immaterial. If important the persons themselves are the best witnesses. Objection overruled. Exception and bill sealed.

"A. Do you mean the articles in the papers? Q. Yes, the articles in the papers. A. Yes, sir. Q. Who? A. I talked to May McDermott, Mrs. McGinley and my sister, Annie O'Toole and Mrs. Corsey. (Third assignment of error.)

Q. State in what way this article had a bad effect upon you?"

To which defendant objected as incompetent. Objection overruled. Exception and bill sealed.

"A. In several ways, not one alone. Q. State in what way? A. It injured my character and prevented me from getting employment from people that would have employed me if that hadn't been in the paper, and it injured me in the society I associate with, and school companions didn't think as much of me afterwards." (Fourth assignment of error.)

Eliza Mulligan, a witness called on behalf of the plaintiff, being upon the stand testified as follows:

"Q. Did you see these articles regarding Miss O'Toole in the Post? A. Yes, sir. Q. When? A. Well, I couldn't tell exactly. Q. About the time of their publication? A. Yes, sir. Q. State if you read them. A. Yes, sir. Q. Do you know of others reading them? A. Yes, sir. Q. And commenting upon them? A. Yes, sir. Q. Favorably or unfavorably to Miss O'Toole?"

To which defendant objected as incompetent. Objection overruled. Exception and bill sealed.

"A. Unfavorably. Q. Did persons talk to you in relation to it? A. Yes, sir. Q. Do you know the fact that persons declined to speak to Miss O'Toole because of the publication of these articles? A. Yes, sir." (Fifth assignment of error.)

A. J. Barr and F. X. Barr who were connected with the newspaper testified that they had offered to publish a retraction which plaintiff declined to accept. This was denied by the plaintiff. No request was made by the defendant to the court for instruction as to this disputed fact.

Verdict and judgment for plaintiff for \$1,600. Defendant appealed.

For appellant, *Willis F. McCook* and *John Marron*.

Contra, *A. V. D. Watterson* and *A. B. Reid*.

Opinion by FELL, J. Filed January 4, 1897.

The objection to the testimony covered by the first assignment of error was upon the ground that the attempt was to prove the declarations of an agent of the company made after the occurrence, and so remote from it as not to be a part of the *res gestæ*. The fact of the agency and the right of the agent to speak for the company were not at the time questioned, and it afterward appeared from the testimony that he was acting within the scope of his authority. The plaintiff had gone to the office of the company to demand a retraction of the libelous publication. What was then said by any one

connected with the newspaper could not be shown as an incident of the litigated act of publication, but it was admissible on other grounds, if the party as editor or manager of the paper or an officer of the company had authority to speak for it. If the answer contained anything as to the motive of publication which was thought to be objectionable, the court should have been asked at the time to strike it out. The objection being based upon specific grounds, all other grounds of objection might be considered as waived.

The second assignment is not supported by an exception to the ruling of the court. The third, fourth and fifth assignments relate to the admission of testimony to show the injurious effect of the publication upon the reputation of the plaintiff among her friends and acquaintances, and that it prevented her from obtaining employment. Testimony as to the effect upon her feelings was properly excluded. There was no attempt to prove the meaning of the words used, or to explain the publication. The purpose was to show in what manner the publication had affected the plaintiff where she was known, and how it had prevented her from earning a living. This was in support of her averment of special damage.

We see no merit in the sixth assignment. The plaintiff had testified that her request for a retraction was refused except on terms that she would not bring suit. On the part of the defendant it was denied that any terms were insisted upon. The fact was not established in favor of either party, and the learned judge might well pass it without comment. He was not asked to say anything in relation to it, and the defendant cannot now be heard to complain that he did not: *Humes v. Gephart*, 175 Pa. 417.

The judgment is affirmed.

Court of Common Pleas No. 1, ALLEGHENY COUNTY.

BODNARIK v. NATIONAL SLAVONIC SOCIETY.

A man became a member of a beneficiary society, the by-laws of which provided that "each member had a right to bequeath his death benefit to whomsoever he pleases," and further, that "if the deceased leaves no testament the death benefit shall be paid to his lawful heirs." The man, at the time he became a member, lived with a woman not his wife, but whom he recognized as such, and in his application directed the benefit upon his death to be paid to her and their children. His real wife he had left years before in Hungary from whom he had a full release for all claims for maintenance and support. There was no doubt that he intended the money due under the benefit to go the

woman with whom he lived, whose first name was different than that of his first wife. Held, that an affidavit of defense to an action upon the benefit certificate by the woman named therein and her children, alleging she was not his real wife, was insufficient to prevent judgment.

No. 807 March T., 1897. Rule for judgment for want of a sufficient affidavit of defense.

John Bodnarik became a member of the National Slavonic Society, receiving the following certificate:

Application: Card of the National Slavonic Society.
No. — CLEVELAND, Dec. 31, 1893.

To the Members of the Garfield Assembly 4 of National Slavonic Society:

The undersigned, being aware of the humanity and charitableness of the National Slavonic Society, and being acquainted with the principles and by-laws and the rules of the Garfield Assembly 4 of said association, applies for membership, and declare, if my application is honored, to fulfill all the duties prescribed for members, and hereby annex particulars:

I was born in the year 1848, month of in Velejte, county of Zemplen, Hungary. Married. Wife's name is: Mary. I reside in Painesville, Ohio. I will the benefit to: Wife and children. I enclose \$1, initiation fee.

JOHAN BODNARIK,

Petitioner.

PROPOSAL.

The undersigned proposes Mr. and recommends him to the honorable assembly. I know him as an honest and capable man, who can become a member of the assembly, and recommend him as such.

JOHN MALUCKY
(Member's signature).

"Garfield" Assembly IV of the National Slavonic Society. Admitted to membership, John Bodnarik, Dec. 31, 1893. [Seal.] F. B. HELLER,

Secretary.

The charter of the society described its object to be, "to afford relief to members in case of sickness, and to assist the families of the deceased;" and among the by-laws it was provided that "each member has a right to bequeath his death benefit to whomsoever he pleases," and "if the deceased leaves no testament, the death benefit shall be paid to his lawful heirs."

Bodnarik died, leaving a family consisting of Mary Bodnarik, whom he recognized as his wife, and three children. It transpired, however, that Bodnarik had been married years before in Hungary to a woman named Annie, and by her had several children. Bodnarik had deserted her before coming to this country and assumed the relations of husband with Mary. Some years before he joined the National Slavonic Society, Annie had come to the United States and prosecuted him in Luzerne county, Pennsylvania, for desertion and non-support. The matter was finally compromised by Bodnarik paying Annie \$100 in full satisfaction of all her claim, and procuring from her a release from all further liability for maintenance and support of herself and children. Thereupon

she separated herself and her children from him, and they never afterwards became members of Bodnarik's family.

Payment of the death benefit was sought on behalf of Mary and her children. The society filed an affidavit of defense, averring the foregoing facts, and denied the right of Mary or her children to recover, on the ground that Annie alone was Bodnarik's legal wife, and she and her children alone entitled to the benefit.

For plaintiff, *A. C. Johnston and W. C. Stillwagen.*

For defendant, *A. & W. A. Blakeley.*

Opinion by STOWE, P. J. Filed June 2, 1897.

The general line of authorities in cases such as this seems to be that the power of designation of beneficiaries must be strictly exercised within the limitations imposed by the charter and by-laws. But the Supreme Court of this State have taken a more liberal view of this subject and indicated a disposition to carry out the desire of the beneficiary whenever it does not conflict with some positive restriction imposed by the terms of the charter or the by-laws of the society and appears to be within the general purpose of the association.

In this case the charter describes one purpose or object of the society to be, "to afford relief to members in case of sickness, and to assist the families of the deceased." It is very clear that John Bodnarik (the beneficiary), when he became a member of this society, did so with the express understanding that at his death the benefits should accrue to Mary (his assumed wife) and his children by her, his then family. In his application, dated December 31, 1893, and upon the basis of which he became a member of this society and acquired his rights to benefits thereby, he declares the name of his wife to be Mary (the present plaintiff), and says: "I will the benefit to my wife and child."

It is true that Mary was not his wife in the legal sense, but the applicant treated and recognized her as such, and she was so understood to be by the defendant, and both parties entered into this arrangement with the understanding on the part of each that Mary and her children were to be the beneficiaries in case of his death. The expression, "I will the benefit to my wife (meaning Mary) and child," does not amount to a testament, but indicates the purpose of the deceased, and when supplemented by the admission of defendant's affidavit of defense, that he, upon his death-bed, stated he wished the benefit to go to her, is conclusive as to his purpose at the time he made his application for membership.

If the deceased had made a will in proper form, designating, in the language of his application, that the benefit was to be for the use of his wife, and stating her to be Mary, we think there could be no doubt as to its validity, and that she would take under it to the exclusion of his actual wife, Annie, because the 33rd by-law prescribes that "each member has a right to bequeath his death benefits to whomsoever he pleases; but as it also provides, "If the deceased leaves no testament, the death benefit shall be paid to his lawful heirs," the question arises, does this, under the circumstances of this case, give the lawful wife and her children a right to this death benefit?

Under the strict construction held in such cases in other States, it is probable that the present plaintiffs could not recover; but under the rule recognized here in *Maneely v. Knights of Birmingham*, 115 Pa. 305, we think the evident understanding of the parties, that the death benefit should accrue to the plaintiffs in this case, should, under the circumstances, be considered as an agreement controlling the direction of the "benefit."

As the general object of the association was for the benefit of the family of deceased members, we think we are not going too far in saying that the legal wife and her children should not be allowed to have this fund. Neither she nor her children were, at the time the deceased entered into the association, had been for years, or have been since, members of his family. She had left him voluntarily upon payment of a consideration satisfactory to both, and released him from all claims for further maintenance and support, and thereafter separated herself and her children entirely from him and his family. We are therefore of opinion that the plaintiff is legally entitled to the death benefit sued for in this case, and therefore direct judgment to be entered for plaintiff against defendant for want of a sufficient affidavit of defense.

Court of Quarter Sessions, LA WRENCE COUNTY.

COMMONWEALTH v. PHILLIPI et al.

*What is necessary to constitute a gambling-house—
What is a common gambler—Act relating to gambling and its construction.*

Nos. 8 and 11 March Sess., 1897. Charge to the jury.

Ben Phillipi, Herman Helling, Dan Smith, D. D. Cunningham, Nathan Hazen, Charles Graham and Norman Cunningham were indicted

at No. 8 March Sessions, 1897; the indictment containing five counts, viz.: 1. Establishing a gambling-house. 2. Keeping a gambling-house. 3. Being a common gambler. 4. Being a common gambler. 5. Enticing others to visit gambling-houses. Scott Cunningham was indicted separately in the same counts at No. 11 March Sessions, 1897, and was tried with the other defendants.

For the Commonwealth, *Robert K. Aiken*, Dist. Atty., and *H. N. Marshall*.

For defendants, *Aaron L. Hazen*, *John G. McConahy*, *J. Norman Martin* and *Frank A. Blackstone*.

MILLER, P. J., March 9, 1897.

Gentlemen of the Jury.—The defendant has requested us to answer the following points:

1. That if the jury should believe from the evidence that the defendants mutually agreed together to go to a room such as has been described in the evidence and play a game of poker, and did actually go and play poker for money, that of itself would be no crime. *Answer*: Affirmed. But if you find from all the evidence that the defendants or any of them engaged in gambling for a livelihood, you would be justified in finding such defendant or defendants guilty on the fourth count.

2. That gambling of itself is no crime; nor is the solicitation of others to gamble a crime. *Answer*: This point as stated is refused. Gambling, under the law, is an indictable offense. The solicitation to gamble is not a crime, unless the solicitation results in persuading or prevailing upon one to visit a place kept for the use of gambling.

The defendants are indicted in this case on five counts and two indictments. Both indictments have, however, precisely the same counts in them, so that practically you are trying these defendants as though they were indicted under one indictment. They are charged in the first count of each indictment with establishing a gambling-house. In the second count of each indictment they are charged with keeping a gambling-house.

It may not be amiss to explain what a gambling-house is as regarded by the law, and what gambling is as regarded under the law. In general, the words "gaming" and "gambling," in the statutes, are similar in meaning, and either one comprehends the idea that by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is as the conclusion, by terms agreed, to be transferred from the loser to the winner; without which latter

element there is no gaming or gambling. "Gaming" implies or is used as describing a condition, an element, of illegality, and when people are said to be gaming, it is generally supposed that the games have been games in which money goes to the victor or his backer. In criminal law, gambling-houses are defined to be houses in which gambling is carried on as the business of the occupants, and which are frequented by persons for that purpose.

The clause of the Act of Assembly under which the first count of the indictment is drawn is as follows: "If any person shall set up or establish, or cause to be set up or established, in any house, room, outhouse, tent, booth, arbor or other place whatsoever, any game or device of address or hazard with cards, etc." Your first inquiry will be, are the defendants or any of them guilty of establishing a gambling-house; and second, whether they are guilty of keeping a gambling-house. That (second) count is drawn under another section of the same Act of Assembly, which reads as follows: "Or if any person shall procure, permit, suffer and allow persons to collect and assemble in his house, room, outhouse, tent, booth, arbor or any other place whatsoever under his control, for the purpose of playing at and staking or betting upon such game or device of address or hazard money or other valuable thing."

If you find from the evidence that Mr. Phillipi permitted gambling in his place of business, in his pool-room, or in a room connected with it, or in any part of the building under his control, you would be justified in finding him guilty on the second count of the indictment. If you find that he had set up a place in his pool-room, or in some room connected with his pool-room, or in the building that he controlled, for the purpose of allowing persons to congregate to play poker or other games of cards for money, you would be justified in finding him guilty on the first count in the indictment.

The only purpose for which the court admitted the evidence with regard to the sale of the table by Phillipi was, in connection with the testimony of the constable, and in connection with the conversation that Phillipi had with him, as to whether or not he had that table in his place of business for the purpose of allowing persons to use it as a gaming-table.

Then as to Scott Cunningham. Did he set up a place for gambling as charged in the first count of the indictment, or did he keep a place for gambling as charged in the second count? The evidence bearing on that is largely the testimony of the officer, Mr. Duncan. If you conclude from the testimony that Scott Cun-

ningham had set up or established a place where poker or other games of cards were played for winning money, you would be justified in finding him guilty on the first count. If you find from the evidence that he permitted boys to congregate at his place of business for the purpose of gaming, you would be justified in finding him guilty on the second count. If they met there and gambled for money, and he permitted them to do so, although there was no rake-off to the room, it would be gambling.

Then we come to the third and fourth counts in the indictment, which charges the defendants with being common gamblers. They are indicted under the 56th section of the Act of 1860. The first clause, under which the third count is framed, reads as follows: "If any person shall keep or exhibit any gaming table, establishment, device or apparatus to win or gain money or other property of value, or aid to assist or permit others to do the same, . . . he shall be deemed and taken to be a common gambler." You will inquire whether any of these defendants kept or exhibited any gaming-table, establishment, device or apparatus to win or gain money or other property of value, or aided, assisted or permitted others to do the same.

Mr. Wood and Mr. Smith testify that at several times, when they were at the Voight House, Scott Cunningham acted as banker; that is, he sold the chips that have been exhibited to you to the persons who played; that he took a rake-off from the table at certain times, and that, when the playing was over, he redeemed the chips from the persons who had won them. If you find the facts as sworn to by Mr. Smith and Mr. Wood, you would be justified in finding that Scott Cunningham aided and assisted, or permitted others to win or gain money or other property of value at this gaming-table, and you would therefore be justified in finding him guilty on the third count of the indictment.

Then we come to the fourth count of the indictment, and it is framed under this clause of the Act of Assembly: "Or if any person shall engage in gambling for a livelihood." The Commonwealth avers that all of these defendants are engaged in gambling for a livelihood.

It is proper for the court to say, that if a man only plays one or two, or a very few games of poker, the jury would not be justified in saying that he was engaging in the business for a livelihood. For instance, there was a Mr. Nye on the stand, a witness who testified to seeing these defendants, or some of them, at different times engaged in gambling. I think he testified that

he played but a single game at this house. Now, if he were indicted, it is not likely that you would find him guilty of being a common gambler because he participated in a single game. That is not the object of the law. The object of the law is to punish men who follow gambling as a business; not as a sole business, but as one of the businesses they engage in to make money and earn a livelihood. It was the purpose of the passage of the act to stop gambling. The law regarded it as a vice; as being injurious to the morals of society; as being injurious to men, especially young men, leading them from the paths of virtue, enticing them from rectitude, causing them to engage in practices that would most certainly lead to their ruin; and hence the law was passed for the express purpose of punishing men engaged in gambling for a livelihood or as one means of earning money.

In considering the question whether these defendants, or any one or more of them, are common gamblers, you would consider what they did; and you would go back and consider the testimony of Mr. Duncan in regard to Phillipi, as to what he was doing, or allowing to be done, or permitting to be done, at his pool-room last summer; what this table in evidence was being used for at his place; what he had it there for. You will inquire what he was going to the Voight House for from the time that Robertson established it up until the time of the raid. Was it simply for amusement, and not for the purpose of gaining or earning money, or of trying to gain money? If he was going there simply for amusement, and not for the purpose of gaining money, he should not be convicted as a common gambler.

What was Doctor Cunningham going to this place for? Was it simply for the purpose of amusement, or was it for the purpose of playing the game that was being run there and to gain money off some other person? Was he following it as a business—as part of the business of his life?

What was Norman Cunningham doing there? You will remember the testimony of the witness Mulcahy in this connection, as far as Norman Cunningham is concerned. It seemed that Norman Cunningham worked on the railroad, and that sometime last summer he was laid off. Mulcahy met him and had a conversation with him, and asked him what he was working at, or where he was working, and Norman Cunningham told him he was not working any place, that he could make more money in the "game" than he could working for the Pittsburgh and Western Railway. What did he

mean by that? Did he mean that he had quit working; quit performing manual labor for a livelihood, and had taken to playing some game? Was he frequenting this room at the Voight House night after night for two months? If he was, what did he go there for? Was it to win money from some one else? Was he there for the purpose of trying to earn a livelihood? If he was, he should be found guilty of being a common gambler.

What was Doctor Cunningham doing there? Was he there for the purpose of earning or trying to earn a livelihood in connection with his other business? If you find that was what he was going there for, night after night, you would be justified in finding him guilty as charged in the fourth count of the indictment.

You will make the same inquiry as to the other defendants, and if you find from the evidence that they were frequent visitors at the room in question for the purpose of playing cards for money, you should convict them.

By ex-Judge Martin:—In justice to Mr. Phillipi, I wish to call the court's attention to a proposition of law that we think is pretty well settled, and that is, that a single act of gaming in a house is not enough to convict a person of setting up a gaming-house.

By the Court:—Gentlemen of the Jury: If you should conclude there was never any person playing cards for money in his pool-room, except this one time, that of itself would not be setting up a place. You will take the testimony of the constable as to what he saw and the conversation he had with Phillipi, and from it all decide whether or not he did set up a place in his pool-room.

Verdict: Ben Phillipi and Scott Cunningham guilty in the first, second, third and fourth counts; the other defendants guilty in the third and fourth counts.

U. S. Circuit Court of Appeals,

THIRD CIRCUIT.

CLARK & CO. v. THE SIGUA IRON COMPANY.

The defendants held \$24,500 of the corporation plaintiffs' bonds as collateral security for the payment of plaintiffs' note of \$30,000 held by them. The defendants agreed to surrender these bonds to the plaintiffs, and in consideration of such surrender the plaintiffs agreed to put in suit certain claims it held for stock subscriptions, and to place the litigation in the hands of attorneys to be selected by defendants, and that any judgments recovered should be assigned to plaintiffs, and any sums collected upon the stock subscriptions should be for the benefit of plaintiffs and be paid to them. *Held*, that this constituted an equitable assignment of the stock subscriptions to the defendants.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before Judges ACHESON, BUTLER and BUFFINGTON.

Opinion by BUFFINGTON, J. Filed June 2, 1897.

This case arises on a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, sued out by Edward W. Clark and others, defendants in a suit brought against them by the Sigua Iron Company. That court made absolute a rule to enter judgment for want of a sufficient affidavit of defense, and its action in so doing is here assigned for error. The statement of claim averred the plaintiff company on January 6, 1894, recovered judgment against F. F. Vandervort in the Court of Common Pleas No. 3, of Allegheny county, for \$3,855.21, which judgment was subsequently affirmed by the Supreme Court of Pennsylvania; that on February 4, 1894, the plaintiff company was placed in the hands of a receiver by the United States Circuit Court for the Eastern District of Pennsylvania; that on January 5, 1895, the defendants in the present suit received from Vandervort for the use of the plaintiff the amount of said judgment and interest, that "having so had and received the said moneys for the use of the plaintiffs the defendants became and are liable to pay the said moneys to the said plaintiffs with interest," that demand for such payment was made before suit brought and refused.

It will be noted that by the plaintiff's statement its right to recover is based upon the receipt by the defendants "for the use of the plaintiff" of the amount of its judgment against Vandervort, and that having so received it and refused to pay it over a right of action accrued to the plaintiff. It would therefore appear that the liability of defendant to pay arises from the averred fact that defendant received the moneys for the plaintiff's use, for if they did not so receive it no other grounds of legal or equitable liability are set forth. In the affidavit of defense filed this averment is traversed in the most explicit language, to wit, "And the statement contained in the plaintiff's statement of claim that said money collected under said judgment and paid to the defendants was due and received by the defendants on behalf of the plaintiff is absolutely false." This explicit traverse placed in issue the question of fact upon which, by the plaintiff's only showing, its right to recover rested and was in itself sufficient to prevent judgment.

It is said, however, that the foregoing traverse was merely the defendant's deduction or con-

clusion based upon the written contract between the parties, a copy of which defendants filed with their affidavit. As the court below based its action upon the construction of the contract we deem it proper this court should express its views upon that point as well.

By the recitals of such contract, which was between the Sigua Iron Company, the plaintiff, and E. W. Clark & Co., the defendants, it appears that on its date, June 15, 1893, the defendants held \$24,500 of the Sigua Iron Company's bonds as collateral security for the payment of \$30,000 owing to them on that company's demand note. The company had claims aggregating \$24,500 against certain named shareholders in designated sums for unpaid capital stock, among others F. F. Vandervort, who owed \$30 per share on 100 shares. Clark & Co. agreed to surrender the \$24,500 collateral bonds "upon the terms and conditions hereinafter set forth," which terms, as pertinent to the present question, were as follows:

"*First.* Messrs. E. W. Clark & Co. will release the aforesaid twenty-four thousand five hundred (\$24,500) dollars of bonds when and as the same are needed for sale or pledge by the Sigua Iron Company, the amount realized from said sales or pledges to be deposited with Messrs. E. W. Clark & Co. to the credit of the Sigua Iron Company, to be held subject to be drawn out at will, from time to time, by the Sigua Iron Company on its check or checks.

"*Second.* The Sigua Iron Company agrees to pursue the aforesaid stockholders, to wit, Messrs. Greene, Vandervort, Berlin and Loring, and use every effort to collect the amounts unpaid on the stock standing in their names respectively, and by litigation is necessary. This litigation shall be placed in the hands of such attorneys as may be appointed for the purpose by Messrs. E. W. Clark & Co. Any sums collected by the company from these stockholders shall be received by the company for the benefit of Messrs. E. W. Clark & Co., and shall be paid to said Clark & Co. And any judgment which may be recovered against any or all of said stockholders shall, at the request of Messrs. E. W. Clark & Co., be assigned to them. Any sums of money realized by said Clark & Co. out of any such judgment or judgments, or any money collected by the company from the said stockholders and paid over to said Clark & Co. shall be received by said Clark & Co. as part payment of the aforesaid note of thirty thousand (\$30,000) dollars."

The affidavit recites that by the contract the iron company assigned and transferred to the defendants its claim against Vandervort, the

fact that the suit against him was instituted by the iron company for the benefit of the defendants under the terms of the contract, and that the money was collected and paid over to Clark & Co. as their proper money; and that they expected to prove all these facts on the trial of the case.

Assuming the averments of the affidavit are true,—and they must be so assumed upon a motion for judgment,—was the plaintiff entitled to judgment?

In considering that question it is to be observed that the general principles applicable to equitable assignments are clear, the difficulty being in the application of such principles to the varying facts of individual cases. To constitute a writing an assignment no particular form of words is necessary. "The phraseology employed is not material provided the intent to transfer is manifested:" *Christmas v. Russell*, 14 Wallace, 84. "Any order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity:" *Spain v. Hamilton's Administrators*, 1 Wallace, 624.

"It is certainly the tendency of all modern authorities to maintain the general doctrine which may indeed be stated as a formula, that wherever a party has the power to do a thing (statute provisions being out of the way), and means to do it, the instrument he employs shall be so construed as to give effect to his intention. It is but the application of the old maxim, *interpretatio chartarum benigne facienda est ut res magis valeat quam pereat—quando res non valet ut ago valeat quantum valere potest:*" *Bond v. Bunting*, 78 Pa. 218.

"An equitable assignment is an agreement in the nature of a declaration of trust, which a chancellor, though deaf to the prayer of a volunteer, never hesitates to execute where it has been made on valuable, or even good consideration:" *Nesmith v. Drum*, 8 W. & S. 10. "It leaves the legal ownership and consequent right of action in the assignor; and it has therefore been treated as a declaration of trust for the assignee, or an agreement that he shall receive the money to his own use; or, as the case may be, to the use of the persons beneficially concerned. Any binding appropriation of it to a particular use, by any writing whatever, is consequently an assignment, or what is the same, a transfer of the ownership:" *Watson v. Bagaley*, 12 Pa. 167; *Fourth Street National Bank v. Yardley*, 165 U. S. 634.

Turning, then, to a consideration of the paper, in connection with the situation of the parties at the time it was drawn, we note that the facts of the case in hand are not those which characterized a number of cases where the debtor, without any additional consideration given, promised to pay or expressed an intention of paying, a previous existing debt from money thereafter received from a specified source. Here a present, valuable consideration passed; in consideration of the iron company's covenants, Clark & Co. covenanted to surrender the \$24,500 of bonds they held as security for their note. What did they receive in return? On plaintiff's contention nothing save the iron company's general covenant to collect assets (which by the recitals of the paper were doubtful in character), and when collected apply the proceeds to defendant's debt if it chose to do so. If it refused to do so, then so far as the money collected was concerned the defendants were remediless and were remitted to a suit for breach of contract against a company which even at that time, by the statements of the contract, was procuring the released bonds "for sale or pledge." As the defendants upon their demand note already has a present right to subject all the assets of the company, including these very claims, to process to enforce payment of its \$30,000, indebtedness, it would follow, to adopt the plaintiff's construction of the paper, that the defendants in substance took nothing by the paper in lieu of the \$24,500 of bonds they agreed to release. Testing such a construction by the standard of ordinary business prudence it cannot reasonably be conceived that Clark & Co. gave up their bonds without acquiring possession or the means of acquiring possession of other equally valuable or tangible assets, but rather that both parties intended to make a particular appropriation of specific property in lieu of the to-be-surrendered bonds. It will be noted that for some reason the paper was explicit in the designation of its subject-matter, the names of the company's debtors, the nature and amount of the claims were set forth in detail and its provisions, whatever they were, extended to the whole amount of each individual claim. The company on its part covenanted, so far as its provisions relate to what was done in the Vandervort claim, *first*, to pursue Vandervort by litigation if necessary; *secondly*, that Clark & Co.'s attorneys should conduct such litigation; *thirdly*, that the judgment recovered should be assigned to Clark & Co., at their request; and *fourthly*, that Clark & Co. should credit the money on the judgment realized upon plaintiff's note. It will be noticed

that so far as the claims collected by judgments were concerned not a dollar of them was ever to come into the plaintiff's hands. This was in substance agreed to by specific provisions for a procedure in which the money would not come into the iron company's hands, and that such was the intent of the parties is shown by the fact that provision was expressly made where the claim was collected without suit for receipt of the money by the company and payment of it to the defendants.

Suit was instituted against Vandervort in the fall of 1893 by the iron company. Judgment was recovered on January 6, 1894, and by the terms of the agreement the plaintiff was then bound to assign the judgment to Clark & Co. The contract made no provision for the company to receive the money collected upon the judgment but simply for the assignment of the judgment to Clark & Co. on request. It could not refuse to do so for a court of chancery would have enforced compliance with its covenant obligation, and for such assignment it had already been compensated by Clark & Co.'s covenant to surrender the bonds. Such assignment was a mere formal duty, necessary, as against Vandervort, to clothe Clark & Co. with legal ownership for the equitable ownership was already vested in them. As against Vandervort the legal ownership and right of action had remained in the trustee, but when the right of action was merged in the judgment, and that too by the action of the attorneys of *cestui que trusts*, the iron company was a mere dry trustee whose sole remaining duty was to assign such judgment on request. With notice of this agreement Vandervort could not thereafter have paid the money to the iron company, and the fact that the right to it had irrevocably passed from the iron company is one of the earmarks which stamp it as an equitable assignment.

Such being the relation of the plaintiff to the judgment and its duty to Clark & Co., it is clear that the plaintiff was not relieved of its duty or Clark & Co. deprived of their rights by the subsequent appointment of a receiver. This judgment was not an asset of the company, and if the company had no right to it, it goes without saying the appointment of a receiver created none.

Upon full and careful consideration we are of opinion the affidavit of defense was sufficient and the court erred in entering judgment. That judgment is therefore reversed and the cause remanded for further proceedings.

For Clark & Co., *Richard C. Dale.*

For Sigua Iron Co., *George Tucker Bispham.*

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